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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-680

RONALD R. HUTCHINSON,
Petitioner,

v.

WILLIAM PROXMIRE and
MORTON SCHWARTZ,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner Dr. Ronald R. Hutchinson respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on June 30, 1978.

OPINION BELOW

The opinion of the Court of Appeals, reported at 579 F2d 1027 (1978), appears in the Appendix hereto, along with the District Court opinion which is reported at 431 F. Supp. 1311 (1977).

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on June 30, 1978. A timely petition for rehearing en banc was denied on July 26, 1978, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Are the press releases and newsletters of a member of Congress entitled to absolute immunity under the Speech or Debate Clause of the United States Constitution?

2. Does a research scientist who has not voluntarily thrust himself into the vortex of any important public controversy become a "public figure" within the meaning of *Gertz* v. *Welch*, 418 U.S. 323 (1974), merely because his work is publicly funded, his scientific articles are published in obscure technical journals, his name occasionally appears in a small local newspaper and his reply to a Senator's attack is printed in various newspapers?

3. Does a defendant's past pattern of malicious defamation coupled with his awareness of the truth and his admitted knowledge of the falsity of some of his statements create a genuine issue of material fact as to the issue of malice?

CONSTITUTIONAL PROVISIONS INVOLVED

The Speech and Debate Clause of Article I, Section 6 of the Constitution of the United States:

> "The Senators and Representatives shall receive a Compensation for their Services . . . and for any Speech or Debate in either House, they shall not be questioned in any other Place."

The First Amendment to the Constitution of the United States:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

This is a civil action by a research scientist (Dr. Ronald R. Hutchinson) against a United States Senator (William Proxmire) and one of the Senator's administrative aides (Morton Schwartz), seeking damages for slander, libel, interference with contractual relations, invasions of privacy and intentional infliction of mental distress. The basis for federal jurisdiction is diversity of citizenship. As explained below, this suit involves a series of allegedly tortious statements made by the Senator and his aide in the context of several telephone calls, a press release, various press conferences, two newsletters, at least two television appearances and at least one radio broadcast.

The Plaintiff in this proceeding, and the Petitioner herein, is Dr. Ronald R. Hutchinson, a research scientist holding several academic degrees including a Ph.D. in experimental psychology from Yale University. Much of Dr. Hutchinson's professional career has been devoted to the study of aggression in humans and animals, including empirical research into possible techniques for quantitatively measuring latent stress and anger. To a large ex-

tent, this research has been facilitated through grants or contracts from various governmental agencies. It was on the basis of this funding that Dr. Hutchinson first came into contact with the Defendants.

In March of 1975, Defendant Proxmire launched a series of monthly press releases which he labeled "Golden Fleece of the Month Awards." Laden with caustic ridicule, sarcasm, and sardonic wit, these press releases were allegedly designed to attract nationwide attention to "the biggest or most ridiculous or most ironic example of government waste" which Proxmire could find each month. In connection with this monthly publicity program, Proxmire assigned his aide, Defendant Schwartz, to hunt for likely targets for the "Fleece".

During the course of his search, Schwartz discovered that a little-known scientist in Kalamazoo, Michigan had received government funding for research which involved, among other things, experiments into the measurement of latent aggression by recording the electrical impulses in the jaw muscles of laboratory monkeys under various conditions. Aware of Proxmire's bias against social scientists, Schwartz decided to focus on Dr. Hutchinson's research as a possible subject for the monthly Fleece.

As the investigation progressed, the Defendants received numerous written statements from the funding agencies explaining the value of Dr. Hutchinson's work. The statement from the National Aeronautics and Space Administration (NASA) included the following information:

"REASON FOR NASA SUPPORT OF WORK BY DR. R. R. HUTCHINSON

> "The National Aeronautics and Space Administration is sponsoring a program of research to develop improved selection and training methods for crews of space vehicles. *This will be of particular importance in possible future long-duration manned space flight.*

> Since crews would be required to live and work together in confined spaces for long periods of time, it will be important to choose people who can work together effectively.
>
> One of the first objectives of this project was to develop measurements of latent anger or aggression in order to measure the development of interpersonal hostility in normal people brought into the laboratory. It was demonstrated that at least one measure, jaw clenching, may be an appropriate indicator for this purpose. This technique records the electrical discharges from the jaw muscles (the masseters). With such recording, an indication of hostility is obtained apparently even when the person is unaware of any change in his attitude, and unaware that his jaw muscles have tightened."

NASA also informed the Defendants of certain specific uses for Dr. Hutchinson's research in connection with manned space missions.

The Office of Naval Research (ONR) also furnished the Defendants with a detailed explanation of the importance of Dr. Hutchinson's work. One significant portion of the report contains the following conclusion:

> "This research has provided the Navy for the first time with an objective scientific testing system for measuring and examining aggressive behavior, and this permits, for example, an evaluation of specific effects of various pharmaceutical agents on these behaviors. Such information could well lead to procedures which would permit control and modification of aggressive behavior in situations where that behavior would be inappropriate and disruptive.."

ONR also added a note concerning the cost of Dr. Hutchinson's reach:

> "It should be noted that Dr. Hutchinson's work was supported by the Office of Naval Research over a six-

> year period at an average of $34,500 per year for all costs, including the use of animals and overhead. This is considered a moderate expenditure by the Navy for basic research."

Another agency statement given to Proxmire and his staff explained the results of a thorough review of Dr. Hutchinson's work:

> "All reviewers recognize the value of Hutchinson's systematic, quantitative approach to an important research area that has often been plagued by subjective techniques. There was also general agreement that Hutchinson is a highly competent, hard-working, and productive investigator, and that his experiments are well designed and well executed."

In addition to these documents, other evidence of the nature and worth of Dr. Hutchinson's research was provided to Schwartz in the course of his telephone conversations with various agency officials. As Schwartz has admitted in sworn testimony, Dr. Woodward, project officer at ONR, defended Dr. Hutchinson's work and described it as "valid" and Dr. Stollnitz, an official at the National Science Foundation (NSF), emphasized the merit of the research and told Schwartz that it was "sound". In response to Dr. Stollnitz's supportive statements, Schwartz criticized the research and misrepresented R. Hutchinson's approval rate at the National Institute of Mental Health (NIMH).

Notwithstanding the abundant and *uncontroverted* evidence that Dr. Hutchinson's research was "of particular importance", "well designed", "well executed", "valid", "sound", and a "moderate expenditure", the Defendants drafted a caustic press release in anticipation of "fleecing" Dr. Hutchinson's work. The release contained several statements which Dr. Hutchinson contends were false

and defamatory, including some statements the falsity of which has been admitted by the Defendants. For example, although both Defendants admittedly knew the statement to be false, the press release charged that Dr. Hutchinson had personally received a half million dollars in research funds and had thereby "made a fortune from his monkeys." In similar fashion, the release charged that Dr. Hutchinson's projects had been "perhaps duplicative," even though the only information in the Defendants' possession with respect to possible duplication was a statement by Dr. Stollnitz of NSF that an agency study had compared Dr. Hutchinson's projects and specifically found "*no* overlap."

The release also mischaracterized the nature of Dr. Hutchinson's research and ridiculed both the doctor and his work. Focusing this ridicule on the fact that Dr. Hutchinson's experiments had involved measurements of jaw clenching as an indicator of latent aggression in laboratory monkeys, Proxmire accused Hutchinson of taking a "bite" out of the taxpayers, and he summarized seven full years of Dr. Hutchinson's scientific research as mere "monkey business" and "nonsense" which was "transparently worthless" and which had "made a monkey out of the American taxpayer." (The complete text of the press release is contained in Appendix A to the Court of Appeals' decision).

After the proposed release was drafted, Schwartz called Dr. Hutchinson and read it to him. Although Dr. Hutchinson vigorously objected to the release as inaccurate and misleading, it was nevertheless submitted to the Senate Service Department on April 15, 1975 for release to 275 members of the news media, including CBS, NBC, ABC, the major wire services, major newspapers and magazines, and also such purveyors of the news as the *National Inquirer*. As a result, the release was widely distributed and received considerable attention across the nation.

Three days later, after the press release had already received nationwide publicity, Proxmire took a copy of substantially the same statement to the Senate and either handed it to the Clerk for insertion into the Congressional Record or read it on the Senate floor. Proxmire is not certain which method he used for entering the press release into the Record.

Later in May of 1975, Proxmire mailed a newsletter to approximately 100,000 people repeating the substance of his press release and further ridiculing Dr. Hutchinson and his work. This newsletter also stated that Proxmire was pressuring various government agencies to terminate their suppoprt of Dr. Hutchinson's research:

> "I've told these government agencies it's time to get out of this 'monkey business' and put an end to worthless studies be they scientific or social." (The complete text of this newsletter is contained in Appendix B to the Court of Appeals' decision.)

In addition to his written statements, Proxmire also ridiculed Dr. Hutchinson on the Bob Barry radio program in Milwaukee (6/17/75), the nationally syndicated Mike Douglas television show (11/24/75) and on at least one other television broadcast. During his appearance on the Mike Douglas show, Proxmire described the funding of Dr. Hutchinson's research as "terrible" and noted that it was one of "the most outrageous examples of wasteful extravagant stupid spending."

During the time that Proxmire's various statements were being published throughout the country, his aide Morton Schwartz, was actively contacting the agencies which had supported Dr. Hutchinson's work and urging them to cut off funding. During several of these telephone calls, Schwartz misrepresented the facts concerning Dr. Hutchinson and his research. For example, he called Dr.

Stollnitz at NSF and falsely stated that Dr. Hutchinson had been terminated from his research position for mismanagement of funds. He also called Dr. Krasnegor at the National Institute of Drug Abuse (NIDA) and falsely stated that "NSF, ONR and NASA were all dropping support of Dr. Hutchinson's work." In addition, Schwartz called Dr. Pollin at NIDA and reminded him that NIDA had not yet received a Golden Fleece. Although Schwartz contends that this "reminder" was merely a joke, Dr. Hutchinson contends that it constituted an implicit threat. During at least one of his agency calls, Schwartz was, by his own admission, "hostile," "upset" and "angry."

Finally, in February of 1976, the Defendants issued a second newsletter of relevance to this case. The newsletter was entitled "Did the Golden Fleece Get Results?" and mentioned several projects which Proxmire had fleeced. Under the heading "Successes," Proxmire claimed credit for cutting off Dr. Hutchinson's funding and stopping his research, as follows:

> "All the studies on why monkeys clench their jaws were dropped. No more monkey business."

It is Dr. Hutchinson's contention that the above-described conduct caused severe injury to his reputation, physical illness, mental distress, and substantial loss of existing and prospective economic advantage. As a result, he filed a Complaint in the United States District Court for the Western District of Wisconsin on April 16, 1976. When the presiding Judge of that District disqualified himself, Judge Leighton of the Northern District of Illinois was designated to hear the case on behalf of the Western District of Wisconsin.

As indicated by the record in this case, the parties have filed numerous motions concerning jurisdiction, venue, extensions of time, amendment to pleadings, answers to in-

terrogatories and production of documents. For purposes of this petition, however, the only relevant motion was the motion filed by Defendant Proxmire on July 6, 1976 demanding dismissal or, in the alternative, summary judgment. This motion was based on claims of an absolute privilege under the Speech or Debate Clause (US Const., Art. I, §6), a qualified privilege under the First Amendment, and the alleged absence of any genuine issue of material fact justifying a trial on merits.

Although no hearing was ever held on this motion, the issues were addressed by the parties in detailed briefs supported by a total of 204 exhibits. After these documents were filed, the Trial Judge issued an Order on December 23, 1976 announcing that he intended to grant summary judgment in favor of Defendant Proxmire, but explaining that he would not enter a final order until a memorandum opinion had been filed. Then, on January 27, 1977, the Trial Judge ordered that the time for filing his memorandum be extended. The anticipated memorandum opinion was eventually issued on April 22, 1977 along with a "Ruling on Motion for Summary Judgment" stating that summary judgment had been entered in favor of Defendant Proxmire. Although the opinion was not entirely clear, the trial court apparently ruled that all of Proxmire's conduct was privileged under the Speech or Debate Clause and the First Amendment and also that there was no genuine issue of material fact justifying a trial on the merits. Dr. Hutchinson then filed a timely notice of appeal and Cause No. 77-1677 was docketed in the United States Court of Appeals for the Seventh Circuit.

With respect to the Co-Defendant (Morton Schwartz), who had not joined in the original motion for summary judgment, the trial court served notice that the suit against the Senator's aide would be dismissed on the Court's initiative unless Dr. Hutchinson made a showing within 30

days that such dismissal should not be ordered. Accordingly, the parties filed various briefs and several new exhibits and, on June 22, 1977, the Trial Judge issued a "Minute Order" dismissing the suit against Defendant Schwartz. No explanatory opinion was filed with the "Minute Order" and, on July 7, 1977, the Clerk of the United States District Court for the Western District of Wisconsin entered a judgment dismissing the action.

Dr. Hutchinson then filed a second notice of appeal to cover the judgment regarding Defendant Schwartz, and the same was docketed in the Seventh Circuit as Cause No. 77-1755. On Dr. Hutchinson's motion, the two appeals were consolidated on July 29, 1977.

Following the appropriate briefing and oral argument, the Court of Appeals entered a judgment on June 30, 1978, affirming the summary judgment and dismissal granted by the District Court. The grounds for the Appellate Court decision, however, were somewhat different than those expressed in the District Court opinion. Specifically, the Court of Appeals extended Speech or Debate immunity to the Defendants' press release and newsletter, but rejected the District Court's application of such immunity to the Defendants' phone calls, television appearance and radio interviews. These calls, appearances and interviews were held to be privileged under the First Amendment because, according to the Seventh Circuit, Dr. Hutchinson was a public figure and the Defendants had acted without malice.

Doctor Hutchinson was deemed to be a public figure because his research was publicly funded, he had published some scientific articles in obscure technical journals, his name had occasionally appeared in a small local newspaper and his response to Proxmire's press release was quoted in various newspapers.

On the issue of malice, the Court of Appeals found that at least some of the Defendants' statements may have been

defamatory falsehoods, but that the Defendants were immune from liability because they were supposedly unaware of the actual or probable falsity of their statements. The court never specifically addressed the affidavits concerning the Defendants' past pattern of malicious defamation or the depositions wherein the Defendants admitted having prior knowledge of the falsity of some of their statements.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Is Inconsistent With The Decisions Of This Court Defining The Scope Of Immunity Under The Speech Or Debate Clause.

The Speech or Debate Clause, US Const. Art. I §6 creates a constitutional privilege which immunizes United States Senators and Representatives from liability for statements made in the course of their deliberations as legislators. An analysis of the applicable precedent defining the scope of this immunity reveals a definite emphasis on the legislative/deliberative character of the activities to be protected. It has been uniformly held that Speech or Debate immunity applies only to those activities which are "legitimate legislative activities." *Gravel* v. *United States,* 408 U.S. 610 (1972); *United States* v. *Brewster,* 408 U.S. 501 (1972); *Tenney* v. *Brandhove,* 341 U.S. 367 (1951).

In construing the term "legitimate legislative activity," this Court has repeatedly emphasized that Congressional conduct is not immune merely because it is related to the legislative process:

> "In no case has this Court ever treated the Clause as protecting all conduct relating to the legislative process. In every case thus far before this Court the Speech and Debate Clause has been limited to an act which was clearly a part of the legislative process — the due functioning of the process." *United States* v. *Brewster,* 408 U.S. 501, 515-516.

To be deemed "legitimate legislative activity," conduct must be *necessary* to Congressional *deliberations*:

> "[T]he courts have extended the privilege to matters beyond pure Speech or Debate in either house, 'only when necessary to prevent indirect impairment of such deliberation.' *United States* v. *Doe,* 455 F. 2d at 760." *Gravel* v. *United States,* 408 at 625.

This limited category of deliberative activity has been held to include official resolutions, committee reports, voting and, of course, actual speeches and debates on the floor of Congress. *Kilbourn* v. *Thompson,* 103 U.S. 168 (1881); *Powell* v *McCormack,* 395 U.S. 486 (1969); *Cochran* v. *Couzens,* 42 F. 2d 788 D.C. Cir. (1930); *Tenney* v. *Brandhove,* 341 U.S. 367 (1951); *Gravel* v. *United States,* 408 U.S. 606 (1972); *Doe* v. *McMillan,* 412 U.S. 306 (1973). Many other Congressional activities, while entirely legitimate, are nevertheless not sufficiently legislative in character to be immune from normal legal constraints. *United States* v. *Brewster, supra,* at 512. The standard for applying the Speech or Debate Clause is neither legitimacy nor relationship to legislative activity, but rather the actual deliberative nature of the conduct itself:

> "Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, *they must be an integral part of the deliberative and communicative processes* by which members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel* v. *United States,* 408 US at 625. (Emphasis Added)

In the instant case, the Court of Appeals has apparently declined to follow the rules enunciated by this Court. In its decision below, the Court of Appeals has held that the Defendants' press release and newsletters were entitled to absolute immunity under the Speech or Debate Clause, even though such political publications are clearly not "an integral part of the deliberative and communicative processes by which members participate in committee and House proceedings," as required by this Court. *Gravel* v. *United States, supra,* at 625.

Furthermore, the decision below directly conflicts with the following statement of Mr. Chief Justice Burger, speaking for a majority of this Court in *United States* v. *Brewster, supra*:

> "It is well known, of course, that Members of the Congress engage in many activities other than the purely legislative activities protected by the Speech or Debate Clause. These include a wide range of legitimate 'errands' performed for constituents, the making of appointments with government agencies, assistance in securing government contracts, preparing so-called *'newsletters'* to constituents, *news releases,* speeches delivered outside the Congress. The range of these related activities has grown over the years. They are performed in part because they have become to be expected by constituents and because they are a means of developing continuing support for future elections. *Although these are entirely legitimate activities, they are political in nature rather than legislative,* in the sense that term has been used by the Court in prior cases. But it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause." *United States* v. *Brewster, supra,* at 512 (Emphasis added).

The inconsistency between the above-cited language and the decision below is patently obvious. Mr. Chief Justice

Burger, speaking for this Court, has specifically stated that newsletters and press releases are *not* entitled to absolute immunity under the Speech or Debate Clause, whereas the Court of Appeals in the instant case has specifically held to the contrary. In light of this conflict a Writ of Certiorari is clearly appropriate.

2. This Case Presents An Important Question Of Constitutional Law Which Has Not Been, But Should Be, Settled By This Court.

As noted in the previous section, the decision below directly conflicts with the language of this Court in *United States* v. *Brewster, supra* at 512. Technically, however, the cited language from the *Brewster* decision is only dicta, rather than binding precedent. Consequently, this Court has never specifically decided the important issue of whether Congressional press releases and newsletters are entitled to absolute immunity under the Speech or Debate Clause.

In their arguments below, the Defendants have consistently maintained the position that the dicta in *Brewster* is neither accurate nor binding nor helpful in the resolution of this significant public question. By combining various statements from a number of related Supreme Court decisions, the Defendants have argued, and apparently convinced the Seventh Circuit, that the dicta in *Brewster* misrepresents the current position of a majority of the Justices of this Court. According to the Defendants, a "new majority" of this Court has formed since the *Brewster* decision in 1972 and, consequently, the same political press releases and newsletters which were so clearly outside the Speech or Debate Clause in that year are now fully cloaked in absolute immunity.

Although Dr. Hutchinson has vigorously disputed the Defendants' convoluted arguments, it is apparent from the

decision below that the Seventh Circuit has accepted the Defendants' position. If the Defendants are correct that this Court has formed a "new majority" which has completely rejected its earlier position in *Brewster,* then it is appropriate that this radical change in the law be clearly enunciated by the Supreme Court, rather than intimated by a Court of Appeals. If, on the other hand, this Court has not reversed its position on the scope of the Speech or Debate Clause, then it should reverse the Seventh Circuit in order to maintain uniformity in the decisions on this issue. In either event, this Court should grant the instant Petition for Writ of Certiorari so that this important question of constitutional law can be directly considered and decided by this Court.

3. Decision Below Contains Inconsistencies Which Are Likely To Confuse Lower Courts And Thereby Impede The Proper Administration Of Justice.

There are at least two inconsistencies in the Court of Appeals' decision which are likely to confuse other courts unless these matters are clarified by this Court. The first inconsistency involves three separate statements by the Court of Appeals which, when read together, are apparently irreconcilable.

On page four of the decision below, the Court of Appeals correctly cites the well-recognized principle that Speech or Debate immunity is limited to "legitimate *legislative* activities." On page six of its opinion, the Court of Appeals correctly characterizes the so-called "informing function" of Congress as a "*non-legislative*" activity. Then, on page ten of its opinion, the Court of Appeals extends Speech or Debate immunity to the informing function. In other words, the Court of Appeals has set forth an erroneous syllogism, as follows:

1. Only legislative activities are immune.

2. The informing function is a non-legislative activity.
3. The informing function is immune.

The Court of Appeals' conclusion defies logic and its three statements are inherently contradictory. As a result, the decision below fails to provide adequate guidance to lower courts and is likely to create confusion as to the true status of the informing function.

Another example of an apparent inconsistency in the Court of Appeals' decision is found in its decision regarding the application of the Speech or Debate Clause to the Defendant's television and radio interviews. In its one-paragraph discussion of this issue, the Court of Appeals relies entirely on a citation to page 512 of the decision in *United States* v. *Brewster.* Based on that citation, the Court of Appeals correctly concludes that such television and radio interviews are not entitled to absolute Speech or Debate immunity.

Although the text at page 512 of the *Brewster* decision does, in fact, clearly indicate that television and radio appearances are outside the scope of the Speech or Debate Clause, it is exactly the same passage in *Brewster* which specifically states that press releases and newsletters are similarly outside the scope of immunity. Since the Court of Appeals earlier rejected the language on page 512 as being inaccurate and unpersuasive dicta, it is clearly inconsistent for the Court to then rely upon precisely the same passage as the sole support for its decision regarding the television and radio interviews.

If the decision below is allowed to stand, the above-cited inconsistencies will create uncertainty and confusion regarding the proper scope of Speech or Debate immunity. Therefore, a Writ of Certiorari should be issued in this matter.

4. The Decision Below Conflicts With The Decisions Of This Court On The Definition Of "Public Figures" Subject To The Malice Standard Of *New York Times* v. *Sullivan*.

In the decision below, the Court of Appeals applied the malice standard of *New York Times Company* v. *Sullivan*, 376 US 254 (1964), after concluding that Dr. Hutchinson was a "public figure" under *Curtis Publishing Company* v. *Butts*, 388 US 133 (1967) and its progeny. A careful analysis of the Court of Appeals' decision, however, reveals that it is in conflict with the decisions of this Court regarding the proper definition of the term "public figure."

In defining the class of "public figures" who must demonstrate "actual malice" (i.e., knowing falsity or reckless disregard of the truth), this Court has enunciated the following rule:

> "For the most part, those who attain this status [i.e., public figures] have assumed rules of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly those classed as public figures have thrust themselves to the forefront of a particular public controversy in order to influence the resolution of the issues involved. In either event, they invite attention and comment." *Gertz* v. *Welch*, 418 US 323 (1974).

In the instant case, it is undisputed that Dr. Hutchinson did not assume any role of especial prominence in the affairs of society and it is obvious that he never thrust himself to the forefront of any particular public controversy in order to influence the resolution of the issues involved. Consequently, Dr. Hutchinson is not a public figure as that term has been defined by this Court. The Court of Appeals, however, found that Dr. Hutchinson was a public figure because his research work was publicly funded, his scientific articles were published in obscure technical journals, his name occasionally appeared in a small local newspaper and his reply to the Defendants' press release was printed in various newspapers. In basing its decision on these factors, the Court of Appeals has essentially rejected the standards enunciated in *Gertz* v. *Welch*, *supra*, and resurrected the discredited standard of *Rosenbloom* v. *Metromedia, Inc.*, 403 US 29 (1971).

In *Rosenbloom*, a plurality of this Court expressed the opinion that the *New York Times* test applied to any "private person involved in a matter of public interest." This standard, however, was specifically rejected in *Gertz* v. *Welch*, *supra*, where this Court concluded that:

> "The extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge this legitimate state interest to a degree that we find unacceptable."

Thus, under *Gertz*, it is clear that a private individual such as Dr. Hutchinson does not become a public figure merely because his research is publicly funded.

It was equally contrary to the *Gertz* standard for the Court of Appeals to elevate Dr. Hutchinson to the status of a public figure merely because his scientific articles were published in obscure technical journals and his name occasionally appeared in a small local newspaper. In the *Gertz* case, the Plaintiff-Petitioner was described as follows:

> "Petitioner has long been active in community and professional affairs. He has served as an officer of local civil groups and of various professional organizations, and he has published several books and articles on legal subjects. Although Petitioner is consequently well-known in some circles, he has achieved no general fame or notoriety in the community."

From this description, it is clear that Mr. Gertz enjoyed greater prominence than Dr. Hutchinson and yet this Court specifically held that it was "*plain* that petitioner was *not* a public figure." Obviously, the Court of Appeals in the instant case has applied a different standard in determining that Dr. Hutchinson's limited publications made him a public figure. The articles which he published were all printed in obscure technical journals which received little or no public attention. Furthermore, the so-called "stories" which appeared in "local papers" were all printed in one small Kalamazoo newspaper and normally consisted of one or two paragraph routine announcements inconspicuously printed in the back pages of the paper among the obituaries and the want ads. If this type of "press coverage" is sufficient to satisfy the "public figure" standard, as the Court of Appeals has held, then the rigorous standard of *New York Times* v. *Sullivan* must necessarily apply to every eagle scout, accident victim or club secretary whose name is ever printed in a newspaper. This conclusion, although mandated by the Court of Appeals' decision, is clearly contrary to the standards enunciated by this Court.

The final factor mentioned by the Court of Appeals involved the fact that Dr. Hutchinson's reply to Proxmire's press release was printed in various newspapers. According to the Court of Appeals, Dr. Hutchinson's denial of the Defendant's statement satisfied the requirement that a public figure have "sufficient access to the means of counterargument to be able to expose through discussion the falsehood and fallacies of the defamatory statements." *Curtis Publishing Company* v. *Butts, supra,* at 155. The Court of Appeals conveniently overlooks the fact that Dr. Hutchinson was unable to respond on the Mike Douglas Show, the Bob Barry Show, or in a Congressional newsletter. Apparently, the Court of Appeals believes that any person

who is defamed automatically becomes a public figure if his denial is mentioned by the press. If this standard is accepted, however, virtually anyone who is ever publicly defamed by a United States Senator will automatically become a public figure. This will occur not by virtue of the victim's status, but by virtue of the persuasive power and influence of the person making the defamatory statements. Thus, the Court of Appeals' decision has basically turned *Gertz* on its head and adopted a completely different definition of the term, public figure.

In *Gertz* v. *Welch, supra,* this Court limited public figure status to the type of person who has "voluntarily exposed himself to increased risks of injury from defamatory falsehoods." This Court should uphold that restrictive definition of public figure status and should grant the instant petition in order to eliminate the conflict between its decisions and the decision below.

5. The Decision Below Is Based Upon Several Serious Misstatements Of Fact And Therefore Constitutes A Gross Miscarriage Of Justice.

Certain critical portions of the Court of Appeals' decision in the instant case are based upon erroneous factual assumptions. For example, in deciding whether this case presents a serious question of material fact as to the issue of malice, the Court of Appeals stated that "Defendants' exhibits include correspondence from agencies which criticize Plaintiff's research technique and project costs. (Defendants' Exhibit 90)." This statement is undeniably false. In fact, Defendants' Exhibit 90 is a letter from the National Institute of Mental Health concerning a research *proposal.* The agency concluded that "the quality of the proposal was far below that of [Dr. Hutchinson's] published work," and therefore declined to fund that particu-

lar proposal. No actual research was ever discussed or criticized in this agency letter.

This factual error is significant because the Court of Appeals relies upon Defendants' Exhibit 90 to demonstrate that the Defendants were faced with conflicting evidence concerning the quality of Dr. Hutchinson's work. Since Defendants' Exhibit 90 did not criticize any of Dr. Hutchinson's actual research, it is clear from the other exhibits and from the Defendants' depositions that the Defendants were not faced with conflicting evidence concerning the quality of Dr. Hutchinson's work but, on the contrary, were in possession of voluminous documents, all of which indicated the falsity of the Defendants' statements. Since the Defendants have admitted their awareness of these documents and have admitted spending a substantial amount of time reviewing these documents prior to issuing their defamatory statements, it appears that there is, at a minimum, a genuine issue of material fact as to whether the Defendants acted in reckless disregard of the truth contained in the agency documents. Since the Court of Appeals' decision on this matter was based upon the erroneous assumption of a divided record, justice mandates that this case be reversed and remanded.

Another misstatement of fact in the Court of Appeals' decision appears in that Court's discussion of the Defendants' press release. There, the Court of Appeals correctly notes that *Doe* v. *McMillan,* 566 F. 2d 713 (D.C. Cir. 1977), Cert. 98 S. Ct. 1607 (1978) extended Speech or Debate immunity only to the 'limited distribution'' of materials ''within the legitimate needs of the Congress.'' After stating that correct rule, however, the Appellate Court committed gross error in finding that the instant case involved ''the limited facilitation of press coverage.'' Contrary to the Court of Appeals' ascertion, it is undisputed that the press coverage of the Defendants' new release was

far from limited. The Defendants' release was submitted to two hundred and seventy-five members of the news media, including CBS, NBC, ABC, all the major wire services, all the major newspapers and magazines, and even the *National Inquirer.* This wide-spread distribution stands in stark contrast to the limited distribution protect in *Doe* v. *McMillan, supra,* where the court specifically noted that ''no attempt [was] made to call attention to the report or its contents.'' Here, virtually every conceivable attempt was made to call attention to Proxmire's press release through the use of television appearances, radio interviews, newsletters, etc. It is certainly a gross inaccuracy to refer to this conduct as ''the limited facilitation of press coverage.''

Still another serious misstatement of fact in the Court of Appeals' decision appears on page 13 where the Court concludes that ''there is no question that Defendant did not have knowledge of the actual or probable 'falsity' of their statements.'' This statement is directly contrary to the evidence in this case. On pages 15 and 21 of Defendant Proxmire's deposition, he admits having actual knowledge that the federal funds in question were not paid directly to Dr. Hutchinson as he falsely stated in his press release. He further admits actual knowledge that the institutions receiving the funds, and not Dr. Hutchinson, had control over the expenditure of these grants. Likewise, on page 63 and 96 of his deposition, Defendant Schwartz has admitted having actual knowledge, prior to the issuance of the press release, that his statement concerning payments to Dr. Hutchinson was false. Moreover, Dr. Hutchinson presented various affidavits demonstrating that the Defendants had actual or probable notice of the falsity of their statements prior to the time of publication. In light of these facts, the above-quoted statement of the Court of Appeals is clearly erroneous.

Since the misstatements cited in this section concern facts critical to the decision of this case, it would be manifestly unjust to allow the Court of Appeals' decision to stand. In order to prevent this gross miscarriage of justice, the instant petition for Writ of Certiorari should be granted and this Court should summarily vacate the judgment below and remand the case for further consideration.

6. The Decision Below Involves Important Principles Of Constitutional Law Having Extraordinary Public Significance.

The instant case is of exceptional importance because it has attracted wide-spread public attention and because it concerns significant constitutional issues of the highest order which directly affect the rights of American citizens to seek judicial redress for tortious injuries inflicted upon them by members of Congress.

If the decision below is not considered and reversed, its broad extension of Speech or Debate immunity could have a profound impact on our society. For example, it could give an overwhelming political advantage to all incumbent candidates by enabling them to maliciously defame their opponents with total impunity. The door would be opened to political character assassination with the simple proviso that all such attacks be printed in the form of a press release or a newsletter.

In the absence of potential liability for defamation, there would be no effective legal deterrent against the intentional publication of defamatory falsehoods by members of Congress. As knowledge of this absolute immunity becomes known to average citizens, it would be logical to expect that the public credibility of members of Congress would be substantially eroded. These are only some of the potential ramifications of the Court of Appeals' decision in the instant case.

With respect to the First Amendment issue, the decision below, if allowed to stand, could signal a return to the previously rejected standard of *Rosenbloom* v. *Metromedia, supra* and, consequently, a serious infringement on the legitimate state interest in the protection of reputation.

The extraordinary constitutional significance and public importance of these issues clearly demonstrates a compelling need for review by this Court.

CONCLUSION

For the foregoing reasons, Dr. Ronald R. Hutchinson hereby respectfully prays that his petition for Writ of Certiorari be granted.

Respectfully submitted,

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Dated: October 19, 1978

APPENDIX A — Opinion Of The United States District Court For The Western District Of Wisconsin Dated April 22, 1977.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

(Before the Honorable George N. Leighton,
United States District Judge, Northern District of Illinois,
sitting by designation)

RONALD R. HUTCHINSON,
Plaintiff,

vs. 76-C-257

WILLIAM PROXMIRE and MORTON SCHWARTZ,
Defendants.

MEMORANDUM

I.

This is a suit by a research scientist against a United States Senator, and one of his administrative assistants, seeking eight million dollars in damages for alleged slander, libel, malicious interference with contractual relations, malicious conduct or conduct with grossly negligent disregard for the truth, invasion of rights to privacy, and intentional infliction of emotional anguish. Jurisdiction is invoked under 28 U.S.C. §1332(a)(1). When this suit was filed the presiding district judge recused himself, and this court was appointed to sit by designation.

Thereafter, the United States Senator moved, in the alternative, for summary judgment. Therefore, the question

to be decided is whether the motion, pleadings, depositions, exhibits, and affidavits disclose there is no genuine issue of material fact and that movant is entitled to judgment as a matter of law. However, to answer this question, this court must resolve three issues. 1. Whether the investigative activities of the United States Senator in connection with his duties as a member of Senate subcommittees were privileged. 2. Whether a press release issued by the United States Senate Service Department and containing the substance of a Senate floor speech by the United States Senator was privileged under the speech or debate clause of the United States constitution. 3. Whether the statements made by the United States Senator to his constituents and in a television appearance were libelous or defamatory. The material facts are as follows.[1]

II.

The plaintiff, Dr. Ronald R. Hutchinson, is a research scientist, president of the Foundation for Behavioral Research, a non-profit organization, former director of research at Kalamazoo State Hospital, Fort Custer State Home, and former adjunct associate professor of psychology at Western Michigan University. From 1966 to 1975, he directed research projects under federal grants from the National Aeronautics and Space Administration (NASA),

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[1] This court acknowledges the invaluable assistance of Ms. Emily Nicklin, a third year student at the University of Chicago Law School, who did the underlying research, analysis of the cases, and the preliminary papers for this Memorandum. The caliber of her work reflects the high standards that characterize American legal education and the ability of the young men and women who are preparing to enter our profession.

the National Institute for Mental Health (NIMH), the National Institute for Drug Abuse (NIDA) and the Office of Naval Research (ONR). These projects were investigations into various aspects of animal and human aggression.

Defendant William Proxmire is the senior United States Senator from Wisconsin. Among his congressional duties is service on subcommittees of the Senate Committee on Appropriations which have jurisdiction and review of budget and appropriations for ONR, NASA, NSF, NIDA, and NIMH. As a member of these subcommittees, he votes on appropriations for government obligations and makes recommendations regarding expenditures. Defendant Morton Schwartz is Senator Proxmire's administrative assistant in legislative matters. His duties included research into efficiency in domestic government spending so that he could make recommendations to his superiors on the desirability of particular appropriations.

Early in 1975, Senator Proxmire directed his staff to gather information on wasteful government spending and provide him with at least one example each month so he could dramatize it, call it to the attention of his colleagues, and thus discourage it. To this end, while speaking on the Senate floor in March, 1975, he established what he called the "Golden Fleece of the Month Award," a program through which he made monthly announcements of wasteful government spending identified by his staff. These announcements were routinely accompanied by a press release publicizing his selection for the award.

The Senate Service Department, under the Senate Sergeant-at-Arms, duplicates and distributes senatorial press releases after reviewing them for conformity with Senate regulations governing use of the mailing frank. Senator Proxmire's office routinely supplies the Service Department with a copy of a proposed release and a list of distributees composed at the Senator's direction with the view

toward conveying information to his constituents, to interested segments of the news media, and his colleagues, either directly or through their constituents. Senator Proxmier established and approved the procedure by which his news releases were sent to the Senate Service Department for duplication and distribution.

In March 1975, Mr. Schwartz learned of Dr. Hutchinson's research from Dr. D. Greenburg, editor of a social science publication who had read of plaintiff's work in NTIS, a weekly abstract of government studies and publications. The NTIS abstract referred to two publications by NASA giving details of Dr. Hutchinson's research, both of which Mr. Schwartz subsequently obtained by mail from NASA's Congressional Liaison Officer, Mr. William Allen. The NASA publications cited other research conducted by plaintiff with grants from ONR, NSF, and the Michigan State Department of Mental Health. Mr. Schwartz contacted ONR and NSF seeking information concerning this research. He spoke with Dr. Robert Woodward of ONR and Mr. Richard Wilson, Congressional Liaison Officer for NSF, inquiring into their reasons for supporting Dr. Hutchinson's projects. At all times, he identified himself as a member of Senator Proxmire's staff. Mr. Schwartz' review of the documents he obtained uncovered one grant to the plaintiff by NIMH, and the additional information that NIMH had rejected all but one 1962 research application Dr. Hutchinson had made to that agency. Having decided that the federal fundings of plaintiff's research constituted a potential "Golden Fleece of the Month Award," Mr. Schwartz spent approximately forty hours over a four-week period reviewing documents and preparing a draft of his findings. During this time, he contacted various state and federal agencies to inquire about the structure of the fundings and to determine their justification.

On or about April 11, 1975, defendant Schwartz telephoned NIMH, and was informed by Mr. Joseph Bracket that other than an expired 1962 grant, plaintiff's research had not been funded by that agency. After this inquiry, Dr. Hutchinson received from NIMH an $11,554 three-year grant commencing on June 1, 1975. Three days later, Mr. Schwartz made telephone calls to various agencies. He contacted the Michigan State Department of Mental Health to inquire about the structure of plaintiff's state fundings. He telephoned NIDA where he was informed that it did not fund any of plaintiff's projects.[2] He telephoned Mr. Fred Stollnitz of NSF and discussed the possibility of that agency receiving a Golden Fleece of the Month Award for its part in the funding of plaintiff's research. Mr. Stollnitz' telephone log of the conversation reveals that Mr. Schwartz criticized the NSF funding, stating that plaintiff's research was obvious and duplicatively funded by ONR; and that NIMH had not granted plaintiff any funds. On April 15, Mr. Schwartz telephoned Mr. Stollnitz to inform him that NSF would definitely receive the award and made comments about what he called Dr. Hutchinson's "grantsmanship." This having been done, a draft of the "Golden Fleece of the Month Award" for April 1975 was prepared and submitted for review by Senator Proxmire and Mr. Howard Shuman, another of his administrative assistants. After some editing, the award draft was finalized and approved. A copy of the news release concerning the award

[2] Since the Golden Fleece Award was given to agencies funding plaintiff's research, he has received at least three federal grants: from NASA for one year commencing February 1, 1976, in the sum of $25,000; from NIDA for six months commencing May 30, 1975, in the sum of $54,800; and from NIMH for three years commencing June 1, 1975, in the sum of $11,554.

was sent to the Senate Service Department by Mr. Shuman on April 15 for release on the morning of April 18, 1975.[3]

On or about April 15, Mr. Schwartz telephoned Dr. Hutchinson, told him of the planned Golden Fleece Award, and read him the text of the press release. Plaintiff objected because he thought it did not fairly evaluate his work, and that his name was misspelled. As was his custom, Senator Proxmire made the award the subject of a Senate floor speech in which he stated that NSF, ONR, and NASA had spent:

> "almost $500,000[4] in the last seven years to determine under what condition rats, monkeys, and humans bite and clench their jaws. From the findings of these studies, it is clear that the government paid a half a million dollars to find out that anger, stopping smoking, and loud noises produce jaw clenching in people .... All this money went to Dr. Roland [sic] R. Hutchinson of Kalamazoo State Hospital in Michigan .... Dr. Hutchinson's studies should make the taxpayer as well as his monkeys grind their teeth. In fact, the good doctor has made a fortune from his monkeys and in the process made a monkey out of the American taxpayer .... In view of the transparent worthlessness of Hutchinson's studies ... it is time we put a stop to the bite Hutchinson and the bureaucrats who fund him have been taking out of the taxpayer."

[3] The release is set out in full as Appendix A to this Memorandum.

[4] There are various estimates of how much federal money plaintiff actually received. Senator Proxmire states that plaintiff received $910,500; plaintiff says that the sum is $820,500.

In the next newsletter he mailed to his constituents following the release, Senator Proxmire told them of the April award. The news item was in the following language:

ROMANTIC LOVE STUDIED

Each month I have decided to offer a "golden fleece" award to the organization or person who has most utterly wasted your tax dollars.

Last month's award went to the National Science Foundation for a study of why people fall in love. For $84,000 the researchers were supposed to find out how people grow dependent upon each other in what they called "romantic love."

Not only is this a question that cannot be answered, like what is infinity, I'm not sure we want an answer. There should be some mysteries in life.

A BITE OUT OF YOUR POCKETBOOK

This month the award is shared jointly by the National Science Foundation, National Aeronautics and Space Administration and the Office of Naval Research. These three organizations have put up $500,000 of your tax money to reach the astounding conclusion that people and monkeys clench their jaws when angry or forced to stop smoking or confronted with loud noise.

In seven years of work by Dr. Ronald R. Hutchinson of Michigan, your money was used to discover that people get angry when they feel cheated and they tend to clench their jaws or even scream and kick. Did you know that? Did you know that monkeys become angry when they are given electric shocks? Or that drunk monkeys do not react as quickly as sober monkeys? That's what your taxes paid for!

Dr. Hutchinson has received one grant after another from various federal bureaucracies to study these earth shaking problems. He has examined crayfish, wasps, boa constrictors, turtles, alligators, opossums, foxes, pigeons, rats, monkeys and humans to discover under what circumstances th show signs of being angry.

TESTS ON ANIMALS

He has "stimulated" the animals by using physical blows, electric tail shocks, intense heat, brain probing, air blasts, foot shocks and loud noises. He has influenced them with morphine, tranquilizers, food, alcohol, caffeine and in the case of humans, with money.

He graduated from animals to humans in 1970. That's when he began to conclude that humans bite and clench their jaws under stress. And that when they feel cheated, they react by screaming and kicking on occasions.

These studies are continuing and several new proposals, if accepted, will mean another $150,000 for this program.

If this use of your tax money makes you want to kick and scream or clench your jaws, then join the club. The good doctor has made a monkey out of the federal bureaucrats.

I've told these government agencies it's time to get out of this "monkey business" and put an end to worthless studies be they scientific or social.

If you have any suggestions for my next "golden fleece" award, please write to me in Washington.

On at least one other occasion, Senator Proxmire mentioned plaintiff by name to his constituents and commented on what he thought was useless research at the expense of taxpayers. And on the same subject, he made some unspecified statements to a District of Columbia reporting firm, contributed to or authored an article in a popular publication called "Human Events Magazine" and gave an interview to "Behavior Today," a journal that publishes articles on subjects within the spectrum of the behavioral sciences. In the meantime, either Senator Proxmire personally, or his assistant Mr. Schwartz, made follow-up inquiries of federal and state agencies concerning their reaction to the April Golden Fleece of the Month Award.

Then on November 24, 1975, Senator Proxmire appeared on the Mike Douglas Show, a nationally televised interview program, and described his "Golden Fleece of the Month Award[s]." In response to questions, he gave three examples; and without naming him, alluded to Dr. Hutchinson's research, saying that one of the awards had been for

> " . . . a study that cost $500,000 to find out why people, rats and monkeys clench their jaws. They found out they clench their jaws when they were angry, when they were prodded by sticks, when they were hungry, and they didn't clench their jaws as much if they had been drinking."

III.

The complaint that began this suit, originally in three counts with a fourth added by amendment, attaches the April 18, 1975 press release as an exhibit and alleges it contained untrue statements and omitted others so that the release incorrectly or falsely summarized studies with the result that Senator Proxmire, his agents and employees libeled, slandered and defamed him by implying that he

improperly or illegally profited personally from his governmental research grants; that defendants' telephoning of various federal agencies and attempting to persuade or pressure them to terminate existing grants or contracts for research, prejudiced and prevented plaintiff from obtaining other grants or contracts from fedaral agencies in the future; that Mr. Schwartz in contacting the federal agencies involved identified himself as Senator Proxmire's staff member and uttered or published slanderous, libelous and defamatory statements which were false regarding plaintiff and threatened or implied to those agencies that if they continued funding of plaintiff's research they would receive Senator Proxmire's "Golden Fleece of the Month Award"; that as a result of defendants' actions, plaintiff lost research funding from various federal agencies, lost the respect of his profession, was subjected to humiliation, held up to public scorn, suffered extreme mental anguish, injury to his feelings, physical illness and pain to his person, accompanied by loss of income and ability to earn money in the future; and that defendants' conduct intentionally violated and infringed plaintiff's right to privacy, his right to peace of mind and tranquility, for which conduct plaintiff seeks judgment against defendants, jointly and severally, in the sum of $8,000,000.

Senator Proxmire's alternative motion for summary judgment concedes as true the issuance of the press release, his investigative activities and those of his administrative assistant, the newsletters to constituents containing statements about Dr. Hutchinson, and the appearance in the Mike Douglas television show accompanied by the statement concerning the Golden Fleece Award for April 1975. The Senator, however, insists that summary judgment in his favor must be entered because the alleged misconduct was legitimate legislative activity and accordingly absolutely privileged by virtue of the speech or debate

clause of the United States Constitution, article I, section 6. He argues that the conduct falls within the investigative or informing functions of Congress, and was related to public contracting and expenditures which are at the heart of congressional business. He insists that his statements and criticisms concerning the use of public funds were privileged under the free speech clause of the First Amendment to the United States Constitution. He says that (1) Dr. Hutchinson, as a recipient of public funds, was and is both a public official and a public figure; and (2) there is no factual basis to support a judgment for the plaintiff in this case because (a) his statements accurately and truthfully reported the public contracting involved; (b) the record demonstrates an absence of malice; that is, knowledge of falsity or reckless disregard of the truth; (c) during his television appearance he did not make any statements that constituted actionable libel, defamation or slander; and (d) Mr. Schwartz' communications with government officials administering public funds were privileged. The motion, contention and argument are supported by a well-documented brief, affidavits, 72 exhibits and references to depositions.

Dr. Hutchinson meets this motion with counter-affidavits, 96 exhibits, and a well-written brief containing two arguments that raise what is claimed to be material issues of fact which can only be resolved by a trial. The counter-affidavits are those of fellow scientists familiar with Dr. Hutchinson's work, government evaluations of his research, newspaper articles about the plaintiff, and a number of scientific papers authored by him. From this, he argues that the conduct of Senator Proxmire and his administrative assistant was not legitimate legislative activity and therefore not privileged under the speech and debate clause. Plaintiff declares that his complaint is not directed at any speech on the floor of the Senate; it is at the libel by re-

publication contained in the press release of April 18, 1975, that contained in newsletters to the Senator's constituents, the allegedly defamatory statement Senator Proxmire made during the Mike Douglas Show, the comments concerning plaintiff to news reporters, and communications with various federal agencies and their staffs. Dr. Hutchinson argues for a restrictive application of the speech or debate clause which, he insists, is mandated by decisions of the United States Supreme Court in a number of its recent pronouncements on the subject.

IV.

A.

The speech or debate clause of the federal constitution provides, in pertinent part, that " . . . Senators and Representatives . . . for any Speech or Debate in either House, . . . shall not be questioned in any other Place." U.S. Const. art I, sec. 6. In *Kilbourn* v. *Thompson,* 103 U.S. 168 (1880), for the first time, the Supreme Court dealt with a challenge to the immunity conferred by the clause. There, a congressional committee witness who refused to deliver certain documents to the committee was ordered taken into custody. He brought suit for false imprisonment against the House Sergeant-at-Arms and members of the House of Representatives who had voted for the order. It was held that in ordering the witness' imprisonment, the House had exceeded its authority; but that the speech or debate clause precluded imposition of liability on the congressmen who voted for the arrest, even though they had violated the witness' constitutional rights. The Court said:

> "It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees,

> to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting. . . . In short, to things generally done in a session of the House by one of its members in relation to the business before it." 103 U.S. at 204.

Thus, actions within the legislative role were held to be within the ambit of the privilege. And consistent with this holding, the Supreme Court has reaffirmed that once it is determined a member of Congress is acting within a "legitimate legislative sphere," the speech or debate clause is an absolute bar to interference. *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491, 503 (1975), citing *Doe* v. *McMillan,* 412 U.S. 306, 314 (1973). The standard for invoking congressional immunity under article I, section 6 of the Constitution is the standard of legitimate legislative activity. In the event of a suit, once it is determined that the conduct complained of meets that standard, the action must be dismissed. The Court has said:

> "[L]egislators acting within the sphere of legitimate legislative activity 'should be protected not only from the consequences of litigation's results but also from the burden of defending themselves.' *Dombrowski* v. *Eastland,* [387 U.S. 82, 85 (1967)] . . . [A] private civil action, whether for an injunction or damages, creates a distraction and forces Members to divert their time, energy, and attention from their legislative tasks to defend the litigation. Private civil actions also may be used to delay and disrupt the legislative function. Moreover, whether a criminal action is instituted by the Executive Branch, or a civil action is brought by private parties, judicial power is still brought to bear on Members of Congress and legislative independence is imperiled." *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491, 503 (1975).

Although it is certain that legitimate legislative activity is within the privilege, considerable confusion exists as to what constitutes legitimate legislative activity because there are expansive dicta and a multiplicity of views in the cases examining various conduct alleged to be protected by the clause. Although the Supreme Court has always insisted that the clause must be read "broadly to effectuate its purpose," *United States* v. *Johnson,* 383 U.S. 169, 180 (1966), recent cases appear to adopt a restrictive view of what is legitimate legislative activity.

The conduct of Senator Proxmire and his administrative assistant can be divided into phases for the purpose of determining applicability of the speech or debate clause:

(1) investigation into federal funding of Dr. Hutchinson's research;

(2) delivery of a speech on the Senate floor by the Senator; and issuance of a press release reciting the facts and content of the Senate speech;

(3) follow-up investigation by the Senator's staff and by him at appropriation hearings; and

(4) the Senator's statement on the Mike Douglas Show, his newsletter to constituents, and his other comments about the plaintiff.

As to the investigation into federal funding of Dr. Hutchinson's research, the Supreme Court has always recognized the authority of Congress to investigate. In *Watkins* v. *United States,* 354 U.S. 178 (1957), dealing with the appeal from a conviction for contempt of Congress, the Court stated:

> "The power of Congress to conduct investigations is inherent in the legislative process. That power is broad. . . . It comprehends probes into departments

> of the Federal Government to expose corruption, inefficiency or waste. But, broad as is this power of inquiry, it is not unlimited. There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress. . . . No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to "punish' those investigated are indefensible." 354 U.S. at 187.

In this case, Senator Proxmire serves on several subcommittees of the Senate Committee on Appropriations. These subcommittees review the budgets of the various agencies with which Dr. Hutchinson has contracted. As a member of these subcommittees, Senator Proxmire votes on appropriations, makes recommendations regarding the distribution of government funds, and concerns himself with their expenditure. Therefore, his inquiries, and those of his administrative assistant, into how American taxpayers' moneys are spent by the agences over which the subcommittees in question had jurisdiction were privileged as legitimate legislative activity under the *Kilbourn* test of "things generally done in a session of the House by one of its members in relation to the business before it." 103 U.S. at 204. This being the case, the court will turn to the issue whether as to Senator Proxmire, the April 18, 1975 press release was also privileged under the speech or debate clause.

B.

The most recent Supreme Court pronouncements on the subject of legitimate legislative activity in the context of republication of congressional activity are *Gravel* v. *United States,* 408 U.S. 606 (1972), and *Doe* v. *McMillan,* 412 U.S. 306 (1973). These pronouncements have an important bearing on the issue to be resolved.

In *Gravel,* the government sought to subpoena a Senator's aide and compel him to testify before a grand jury investigating the release and republication of certain classified documents, the Pentagon Papers. It appears that Senator Gravel had convened a subcommittee meeting and had read extensively from the classified materials. He then inserted a forty-seven volume study into the Congressional Record and, some weeks later, arranged for their republication by a private printing company. The Senator, as intervenor, moved to quash the subpoena and to require the government to specify the questions it was going to ask his aide, contending that requiring the aide to testify would violate the speech or debate clause. In a six to three decision, the Supreme Court agreed with Senator Gravel, holding that the speech or debate clause extended immunity to both him and his aide with respect to events which occurred in preparation for the conduct of the subcommittee meeting. However, the Court held that there was no immunity with respect to arrangements the Senator had made for private republication of the Papers. With regard to the immunity that extended to the Senator's aide, the Court said,

> "[I]t is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; . . . the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos; and . . . if they are not so recognized, the central role of the Speech or Debate Clause — to pre-

vent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary [citation omitted] — will inevitably be diminished and frustrated." 408 U.S. at 616-617.

The court emphasized that aides are only protected insofar as they "perform or aid in the performance of legislative acts." 408 U.S. at 618. Thus, they are protected only to the extent they perform acts which would be privileged were the legislator-superior to perform them.

In holding that the privilege precluded questioning of either the Senator or his aide about the subcommittee meeting, but not about the arrangments for private republication, the Court found that the subcommittee meeting easily met the *Kilbourn* test of acts "generally done in a session of the House by one of its members in relation to business before it." 408 U.S. at 624. The Court assumed that action taken in committee was legitimate legislative activity, without examining its relationship to pending legislation or ordinary committee business. Arrangements for private republication of the Papers were found not to meet the test because they were unrelated to the legislative process. 408 U.S. 625-26. The court warned:

> "Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberate and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." 408 U.S. at 625.

Private republication, the Court found, was not central to Senate deliberations; consequently, a grand jury inquiry into arrangements for private republication did not threaten Senate independence by "impermissibly" exposing Senate deliberations to executive influence. 408 U.S. at 625.

In *Doe* v. *McMillan*, 412 U.S. 306 (1973), parents of children in the District of Columbia school system brought a class action alleging that the release and publication of a congressional committee report on the District of Columbia school system revealed embarrassing information about individually named children, infringed their right to privacy, damaged their mental and physical health, and harmed their reputations and future careers. The parents sought to enjoin further publication, and recover compensatory and punitive damages. The defendants, among others, included (1) the Chairman and members of the House Committee on the District of Columbia; (2) various committee staff members; and (3) the Superintendent of Documents and the Public Printer.

The District Court dismissed the complaint as to all defendants; the Court of Appeals affirmed; the Supreme Court affirmed in part and reversed in part, holding that the complaint was barred by the speech or debate clause "insofar as it sought relief from the Congressmen-Committee members, from the Committee staff, from the consultant, or from the investigator, for introducing material at Committee hearings that identified particular individuals, for referring the report that included the material to the Speaker of the House, and for voting for publication of the report." 412 U.S. at 312. These acts, and distribution of the report, the Court said, were "legislative acts." 412 U.S. 312. It recognized explicitly that, constitutionally, there was no judicial authority to oversee the judgment of the Committee with respect to the utility or necessity of

including the names of particular children in the report. 412 U.S. at 313.

However, the Court refused to extend the privilege to non-legislator personnel who published the report for the purpose of informing the public about congressional business. Therefore, it found that the Superintendent of Documents and the Public Printer enjoyed no immunity to carrying out the directions given them to publish the report, although Congressmen and their staffs were immune from suit for ordering the publication that went beyond the requirements of the legislative function. In holding liable those who, at the direction of Congress, distributed actionable material to the public, the Court commented:

> "To hold otherwise would be to invite gratuitous injury to citizens for little if any public purpose. We are unwilling to sanction such a result, at least absent more substantial evidence that, in order to perform its legislative function, Congress must not only inform the public about the fundamentals of its business but also must distribute to the public generally materials otherwise actionable under local law." 412 U.S. at 316-17.

The "informing function" of Congress was not undermined by the holding, the Court insisted, because congressional materials such as reports are available for inspection by the press and the public. 412 U.S. at 317.

The dissent in *Gravel* joined the *Doe* majority with Justice Douglas' concurring opinion emphasizing that:

> "We all should be painfully aware of the potentially devastating effects of congressional accusations. . . . There can be no question that the [Senate] resolution authorizing the investigation and study expressed a legitimate legislative purpose. Nevertheless, neither the investigatory nor, indeed, the informing function of Congress authorizes any 'congressional power to expose for the sake of exposure'." 412 U.S. at 329, 330, (citing *Watkins* v. *United States,* 354 U.S. 178, 200 (1957).)

Three members of the *Gravel* majority, Chief Justice Burger and Justices Blackmun and Rehnquist, dissented. They argued that the speech or debate clause should be read to cover preparation, content, and publication of any committee report, once it is determined that it was properly authorized by Congress and had a valid legislative purpose. 412 U.S. at 331 *et seq.* Therefore, *Doe* v. *McMillan* suggests a restrictive view of what constitutes legitimate legislative activity in the context of private defamation actions. By distinguishing between the Congressmen and their staff, on the one hand, and the Public Printer and the Superintendent of Documents, on the other, the Court has made it clear that authorizing and requesting distribution of a privileged speech or document may not be made the basis of civil or criminal liability, while distribution by non-legislators may lead to liability because the privilege of the speech or debate clause does not apply.[5]

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[5] In other cases, the Court has shown a willingness to impose liability on those who act at the direction of legislators, while protecting the legislators themselves. See, *e.g., Powell* v. *McCormack,* 395 U.S. 486 (1969), where certain House members, the House Sergeant-at-Arms, and the House Doorkeeper were sued for violating constitutional rights; House members held immune under speech or debate clause, Sergeant-at-Arms and Doorkeeper held not immune for carrying out House members' orders; *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967), where legislators and their counsel accused of participation in conspiracy to violate constitutional rights, legislators held immune

In the case at bar, Senator Proxmire resists liability for the press release on two grounds, one of which is compatible with *Gravel* and *Doe*. First, he argues that no liability can be imposed upon him for authorizing the release because the subject matter of the statement, appropriations and expenditures, is within his immediate jurisdiction as a member of the various subcommittees on appropriations. Hence, his conduct is absolutely privileged, as were the action of the subcommittee members in *Doe*. Second, he insists that his authorization of the press release is immune because it is an exercise of the "informing function." Congress has enacted legislation to establish guidelines and mechanisms for distribution of various materials. The franking statute, 39 U.S.C. §3210 (1970), promotes the "informing function" by authorizing free use of the mails. The statute specifically includes press releases and newsletters " . . . which may deal with such matters as the impact of laws and decisions on State and local governments and individual citizens; reports on public and official actions taken by Members of Congress; and discussions of proposed or pending legislation or govenmental actions and the positions of Members of Congress on, and arguments for or against, such matters." 39 U.S.C. §3210 (3)(B). Moreover, Congress has established an administrative procedure for policing possible abuses of the franking privilege. See 2 U.S.C. §501, *et seq.*

Lower courts have recognized the legitimacy of the "informing function" as a legislative activity in actions involving alleged abuses of the franking privilege. In *Hoellen* v. *Annunzio*, 348 F. Supp. 305 (N.D. Ill. 1972), *aff'd* 468 F.2d 522 (7th Cir. 1972), *cert. denied*, 412 U.S. 953

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[5] (Continued)
under clause, no immunity necessarily extended to their counsel; *Kilbourn* v. *Thompson*, 103 U.S. 168 (1880).

(1973), the district court held that the use of the frank to send constituents questionnaires which contained the defendant-Congressman's photograph was a legitimate mailing "upon official business" in the exercise of the "informing function." See *Bowie* v. *Williams*, 351 F. Supp. 628 (E.D. Pa. 1972). For these reasons, this court is constrained to agree with Senator Proxmire. The speech or debate clause of the constitution renders him immune from liability to Dr. Hutchinson for his authorization of the press release of April 18, 1975. That press release, in a constitutional sense, was no different than would have been a television or radio broadcast of his speech from the Senate floor.

C.

The remaining issue is whether Senator Proxmire's statement on the Mike Douglas Show, his newsletter references to Dr. Hutchinson's research and fundings, his comments to news reporters and in interviews either mentioning Dr. Hutchinson by name or alluding to his work, were libelous or defamatory. Resolution of this issue depends on Dr. Hutchinson's position in his community, and the interest of the public in the research projects for which he had received federal funding.

In *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), the Supreme Court held that the First Amendment provides a conditional immunity from liability in libel actions brought by public officials. The Court ruled that to preserve free, uninhibited discussion of public issues, a newspaper could not be held liable for publishing a defamatory falsehood about a public official unless the plaintiff demonstrated with "convincing clarity" that the publication was made with "actual malice"; that is, actual knowledge of falsity or reckless disregard of the truth. 376 U.S. at 279-

80. In *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967), the Court extended New York Times to actions brought by "public figures," persons who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." 388 U.S. at 164 (Warren, C.J., concurring). The test formulated in *New York Times* represents recognition that freedoms of speech and press are essential to open discussion of public issues, freedoms our founding fathers deemed fundamental for the continued existence of our governmental system. *New York Times* v. *Sullivan*, 376 U.S. at 270. The test recognizes that:

> "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive' . . . . " *Id.* at 271-72.

Soon after this extension, a plurality of the Court held in *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971), that the *New York Times* test applied whenever the publication concerned matters of general or public interest, without regard to the plaintiff's position in his community. 403 U.S. at 43. This holding was abandoned in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), where it was decided that a publisher is liable to a public figure "only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth." 418 U.S. at 342. However, in the case of private individuals, a less demanding standard is constitutionally permissible. At least where the substance of the defamatory statement makes substantial danger to reputation apparent, states may define for themselves the appropriate standard of liability, provided they do not impose liability without fault. 418 U.S. at 347, 348. However, states may not permit recovery of presumed or punitive damages, at least where liability is not based on a showing of "actual malice" as defined by *New York Times*. *Id.* at 349.

It is not easy to determine whether a plaintiff is a public figure or a private individual. As one court has wryly observed, "Defining public figures is much like trying to nail a jellyfish to the wall." *Rosanova* v. *Playboy Enterprises, Inc.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976). In a recent decision, *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976), the Supreme Court held that the plaintiff was not a public figure since she had not assumed any role of "especial prominence in the affairs of society . . . ." *Id.* at 453. The fact that she had held press conferences during a well-publicized divorce proceeding was insufficient to make her a public figure for the purpose of determining the constitutional protection afforded the defendant's report of her divorce.

The term "public figure" has been variously defined. In *Gertz*, the Court stated that "[t]hose who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures . . . " 418 U.S. at 342. Designation as a public figure:

> " . . . may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becames a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 351.

The court added:

> "Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Id.* at 352.

Lower court determinations regarding the public figure status of a plaintiff in a defamation action have followed the Court's suggestion and examined the plaintiff's role in the controversy out of which the defamation arises. See, generally, Annot., 75 A.L.R. 3d 616 (1977). In *Rosanova* v. *Playboy Enterprises, Inc.*, 411 F. Supp. 440 (S.D. Ga. 1976), the court concluded that the plaintiff was a public figure for purposes of a libel action based on defendant's magazine article identifying him as a "mobster" because over the years he had voluntarily engaged in a course of conduct bound to invite attention and comment through his voluntary contacts with organized crime figures. In *Hotchner* v. *Castillo-Puche*, 404 F. Supp. 1041 (S.D.N.Y. 1975), the plaintiff was found to be a public figure for purposes of libel action based on defendant's book about Ernest Hemingway. Although the plaintiff's name was not well known in the community, he had successfully published a number of widely distributed works based on his relation with Hemingway, and was thus found to have injected himself into controversies surrounding the later years of the novelist's life, a matter of considerable public interest. In a number of other cases, and on varying facts, courts in different parts of the country have reached the same conclusion. *Guitar* v. *Westinghouse Elec. Corp.*, 396 F. Supp. 1042 (S.D.N.Y. 1975), *aff'd*, 538 F.2d 309 (2d Cir. 1976);

Buchanan v. *Associated Press*, 398 F. Supp. 1196 (D.D.C. 1975); *Fram* v. *Yellow Cab Co.*, 380 F. Supp. 1314 (W.D. Pa. 1974); *Meeropol* v. *Nizer*, 381 F. Supp. 29 (S.D.N.Y.), *pet. denied*, 508 F.2d 837 (2d Cir. 1974). The question whether the *New York Times* test applies to a case is one of law. "[I]t is for the trial judge in the first instance to determine whether the proofs show [plaintiff] to be a [public figure or a] 'public official'." *Rosenblatt* v. *Baer*, 383 U.S. 75, 88 (1966); *Rosanova* v. *Playboy Enterprises, Inc.*, 411 F. Supp. 440, 444 (S.D. Ga. 1976); *Hotchner* v. *Castillo-Puche*, 404 F. Supp. 1041, 1045 (S.D.N.Y. 1975).

Here, Dr. Hutchinson argues that he is not a public figure because he has never voluntarily exposed himself to extensive public attention, nor assumed any role of special prominence in the affairs of society, nor thrust himself to the forefront of public controversy. He contends that the media coverage of his research before the "Award" was limited to brief articles in largely local newspapers. Moreover, he argues that because of the information for these articles was solicited from him by the News and Publications' Department of Western Michigan University which provided him with 'forms' for reporting on his work to the media, he did not initiate media coverage and hence did not invite public attention and comment.

Senator Proxmire contends that in the area of criticism, the merit of publicly-funded studies, plaintiff has sought and acquired a public standing and reputation. He was published widely in the scientific community, claiming more than forty behavioral science articles. Except for the period 1960-61, he has been employed as a research scientist at various public institutions. Since 1966, his achievements, grants and studies have been the subject of media coverage. Defendant argues that this media coverage indicates not only that plaintiff is a public figure but that he solicited that status through press releases and interviews.

Given Dr. Hutchinson's long involvement with publicly-funded research, his active solicitation of federal and state grants, the local press coverage of his research, and the public interest in the expenditure of public funds on the precise activities in which he voluntarily participated, the court concludes that he is a public figure for the purpose of this suit. As he acknowledged in his deposition, "Certainly, any expenditure of public funds is a matter of public interest."

He is also, in the judgment of this court, a public official. *See generally Annot.*, 19 A.L.R.3d 1361 (1968). Although the Supreme Court has never articulated the limits of this classification, *Rosenblatt* v. *Baer*, 383 U.S. 75 (1966), offers some guidance. There, the Court held that the *New York Times* test was applicable to a libel action brought by a former supervisor of a county recreation area who was appointed by and responsible to three county commissioners. The alleged libel had criticized fiscal management under the plaintiff's regime. The Court stated:

> "The thrust of *New York Times* is that when interests in public discussion are particularly strong, as they were in that case, the Constitution limits the protections afforded by the law of defamation. Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, . . . the *New York Times* malice standards apply. . . . The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy. *Id.* at 86, 86-87, fn. 13.

In *Aday* v. *United Action for Animals*, 361 F. Supp. 457 (S.D.N.Y. 1973), *aff'd*, 493 F.2d 1397 (2d Cir. 1974), *cert. denied*, 419 U.S. 842 (1974), the district court found that the plaintiff, a research scientist employed by NASA and involved in planning a space flight for a monkey, was both a public figure and a public official for the purpose of an action based on allegedly defamatory remarks about his treatment of experimental animals. In this case, Dr. Hutchinson held the important public position of director of research at the Kalamazoo State Hospital in Kalamazoo, Michigan; he was dealt with as a responsible public official by the federal agencies that funded his research; and he holds himself out as the President of a not-for-profit corporation that purports to act in the public interest. Therefore, at the times relevant to this controversy he held "a position in government * * * [with] such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it . . . . " *Rosenblatt* v. *Baer*, 383 U.S. 75, 86 (1966).

This important fact appears from the affidavits, exhibits, and excerpts from depositions that support the motion for summary judgment; and consequently, the question arises; has Dr. Hutchinson made a sufficient showing that there is a genuine issue of material fact with regard to actual malice on the part of Senator Proxmire; i.e., knowledge on his part of the falsity of what he said, or a reckless disregard by him of the truth, when he made the statements about which complaint is made? The showing of malice may not be presumed but must be proved by the plaintiff. *Time, Inc.*, v. *McLaney*, 406 F.2d 565, 572 (5th Cir. 1969), *cert. denied*, 395 U.S. 922 (1969). A bare allegation of malice, standing alone, is not sufficient to withstand a motion for summary judgment. *Fram* v. *Yellow Cab Co.*, 380 F. Supp. 1314, 1335 (W.D. Pa. 1974); *Goldman* v. *Time, Inc.*, 336 F. Supp. 133, 138 (N.D. Cal. 1971).

Rule 56(e) of the Federal Rules of Civil Procedure requires a party opposing a motion for summary judgment to show specific facts, admissible in evidence, which establishes that there is a genuine issue for trial. Moreover, under *New York Times*, the standard of proof plaintiff must meet at trial is more than a preponderance of evidence; it is a showing of defendant's actual knowledge of falsity or reckless disregard of the truth by "clear and convincing evidence." *Vandenburg* v. *Newsweek, Inc.*, 507 F.2d 1024, 1026, 1029 (5th Cir. 1975); see *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-80 (1964); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

"Knowledge of falsity" presumably means just what it says: subjective awareness by the defendant that his statements were false. "Reckless disregard of the truth," on the other hand, has been defined by several Supreme Court decisions to require that the defendant act with a "high degree of awareness of . . . probable falsity." *Beckley Newspapers Corp.* v. *Hanks*, 389 U.S. 81, 84 (1967); *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964). In the leading case of *St. Amant* v. *Thompson*, 390 U.S. 727 (1968), the Court found the "reckless disregard" requirement unsatisfied where the defendant had published defamatory falsehoods about the plaintiff without personal knowledge of the matter published. The Court said,

> " . . . reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. . . . The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive . . . where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt to veracity of the informant or the accuracy of his reports." 390 U.S. at 731, 732.

Measured by this standard, it is clear that Dr. Hutchinson's allegations of libel and defamation fall short. His arguments that he was subjected to these torts proceed, basically, along these lines: failure to investigate; unfair editing in disregard of the facts before defendants; and republication after plaintiff complained about the press release of April 18, 1973. From *St. Amant*, it is clear that failure to investigate is insufficient to establish reckless disregard to the truth. Moreover, the record shows that Mr. Schwartz, on behalf of Senator Proxmire, spent approximately forty hours over a four week period gathering and reviewing agency documents regarding plaintiff and making a draft of his findings. During that time, he contacted various state and federal agencies to verify his findings and to inquire about the justification for the funding in question. Senator Proxmire and his administrative assistant, Howard Shuman, reviewed Mr. Schwartz' findings. Before publishing the release, Schwartz telephone plaintiff to read him the text of the release and ask him if there were any factual misstatements. Dr. Hutchinson said that the intended release did not fairly evaluate his research, but corrected only a misspelling of his name.

The charge now being made that defendants' unfair editing in disregard of the facts before them is also insufficient to establish actual malice. Undoubtedly, editing involves making choices; but selective reporting will not support a

finding of reckless disregard of the truth. Summarizing plaintiff's research for the purpose of making some statement about its federal funding will not rise to the level of falsification. In *Time, Inc.* v. *Pape,* 401 U.S. 279 (1971), a magazine reported as a charge by the United States Commission on Civil Rights an incident of police brutality which the Commission itself, in its report, characterized as the allegations of a civil rights complaint. Notwithstanding the fact that the reporters themselves were aware that the Commission attributed its account of the incident to a court complaint, the Court held that the failure to include such a secondary attribution in the article was not 'falsification' sufficient in itself to sustain a jury finding of 'actual malice'." 401 U.S. at 289. It would appear that an error in interpretation of ambiguous documents, such as the conglomeration of plaintiff's grants and publications, through the adoption of one of several rational alternatives, is insufficient to create a jury issue.

Moreover, Dr. Hutchinson's claim with regard to unfair editing and summarization of his research is not buttressed by Senator Proxmire's characterizations as "nonsense" and "transparently worthless" or the suggestion that the news release gives the false impression of $500,000 having been paid personally to plaintiff; and that he was making a fortune from government money. In *Greenbelt Cooperative Publishing Ass'n, Inc.* v. *Bresler,* 398 U.S. 6 (1970), plaintiff was a land developer who was seeking zoning variances from a town which was in turn attempting to buy land from him. He used his position as seller to strengthen his position in requesting the variances. Defendant-newspaper had reported third-persons' characterizations of plaintiff's conduct as "blackmail." The Court held that, as a matter of constitutional law, the use of the word "blackmail" in this context was not libelous:

> "[E]ven the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [plaintiff's] negotiating position extremely unreasonable." 398 U.S. at 14.

Here, too, it would appear that Senator Proxmire's statement, "the good doctor has made a fortune from his monkeys and in the process made a monkey out of the American taxpayer" is, at worse, no more than rhetorical hyperbole. Compare *Time, Inc.* v. *Johntson,* 448 F.2d 378 (4th Cir. 1971).

Defendant's republication of the allegedly defamatory remarks after plaintiff complained about the release also appear insufficient to raise a jury issue of actual malice. Defendants Proxmire and Schwartz believed the statements to be true when made and still believe them to be true. Nothing in either defendant's affidavit or deposition indicates that they ever entertained any doubt as to the truth of their statements.

The constitutional privilege of *New York Times* mandates summary judgment once it becomes clear that a plaintiff cannot establish the actual malice required for recovery in defamation action of this nature. *Meeropol* v. *Nizer,* 381 F. Supp. 29, 32, fn. 1 (S.D.N.Y. 1974), *pet. denied,* 508 F.2d 837 (2d Cir. 1974). However, " '[o]n a motion for a summary judgment the burden of establishing the non-existence of any genuine issue of fact is upon the moving party, *all doubts are resolved against him,* and his supporting affidavits and depositions, if any, are carefully scrutinized by the court'." *Rose* v. *Bridgport Brass Co.,* 487 F.2d 804, 808 (7th Cir. 1973) [citations omitted]. But the court has a special responsibility here to determine if there is any genuine dispute because of the danger that speech may be chilled by the mere fact of litigation. *Guam Fed. of Teach-*

ers, Local 1581, A.F.T. v. *Ysrael,* 492 F.2d 438 (9th Cir. 1974), *cert. denied,* 419 U.S. 872 (1974); *Oliver* v. *Village Voice, Inc.,* 417 F. Supp. 235, 237 (S.D.N.Y. 1976). The court must make a threshold determination, before trial, whether there has been a showing of actual malice. *Bon Air Hotel* v. *Time, Inc.,* 426 F.2d 858, 864 (5th Cir. 1970); *Wasserman* v. *Time, Inc.,* 424 F.2d 920, 922 (D.C. Cir. 1970) (Wright, J. concurring), *cert. denied,* 398 U.S. 340 (1970). "[I]n making this determination, the granting of summary judgment may well be the 'rule' rather than the 'exception'." *Oliver* v. *Village Voice, Inc.,* 417 F. Supp. 235, 237 (S.D.N.Y. 1976); *Guitar* v. *Westinghouse Elec. Corp.,* 396 F. Supp. 1042, 1053 (S.D.N.Y. 1975), *aff'd* 538 F.2d 309 (2d Cir. 1976); see also, *Perry* v. *Columbia Broadcasting System, Inc.,* 499 F.2d 797 (7th Cir. 1974), *cert. denied,* 419 U.S. 883 (1974); *Cervantes* v. *Time, Inc.,* 464 F.2d 986 (8th Cir. 1972), *cert. denied,* 409 U.S. 1125 (1973); *Washington Post Co.* v. *Keogh,* 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied,* 385 U.S. 1011 (1967).

But even if for the purpose of this suit it is found that Dr. Hutchinson is a private person so that First Amendment protections do not extend to Senator Proxmire and his administrative assistants, relevant state law dictates the grant of summary judgment. In a diversity action, under the doctrine of *Erie R. Co.* v. *Tompkins,* 304 U.S. 64 (1938), a federal court must apply the conflict of laws doctrine of the state in which it sits. *Klaxon Co.* v. *Stentor Elec. Mfg. Co.,* 313 U.S. 487 (1941). Thus, sitting in Wisconsin where the suit is filed, this court must look to the choice of law principles of this jurisdiction to determine what state law to apply. In *Wilcox* v. *Wilcox,* 26 Wis. 2d 617, 133 N.W.2d 408 (1965), the Wisconsin Supreme Court abandoned the *lex loci delicti* approach to choice of law problems in tort cases and adopted the general approach of *Babcock* v. *Jackson,* 12 N.Y.2d 473, 240 N.Y.S.2d 743, 191

N.E.2d (1963). It has since elaborated on the new method of analysis and adopted "choice-influencing" considerations which are "Predictability of results, Maintenance of interstate and international order, Simplification of the judicial task, Advancement of the forum's governmental interests, Application of the better rule of law." *Conklin* v. *Horner,* 38 Wis.2d 468, 157 N.W.2d 579, 583 (1968); accord, *Heath* v. *Zellmer,* 35 Wis.2d 578, 151 N.W.2d 664 (1967). It is not certain what law Wisconsin would apply in this case, using these "choice-influencing" considerations; but it appears the option is logically limited to the law of two jurisdictions, that of, the District of Columbia, the place where defendants work and their allegedly wrongful conduct originated, or of Michigan, the plaintiff's domicile, where the injury presumably had effect. For application of the relevant law, the conduct consisted of (1) the April 18, 1975 press release and the newsletters to constituents; (2) the Mike Douglas Show appearance and the other alleged defamations, some of them unspecified. However, under the law of either jurisdiction, Dr. Hutchinson cannot recover in this case.

In the District of Columbia, an alleged defamatory publication must be construed in the sense in which readers to whom it is addressed would ordinarily understand it. "The publication is to be read as a whole . . . . If after an examination of the entire article there is only one reasonable interpretation of its meaning, it is for the judge . . . to say whether or not the words are defamatory." *Johnson* v. *Johnson Publishing Co.,* 271 A.2d 696, (D.C. Ct. App. 1970). Only if a publication is libelous *per se,* are questions of malice, truth, and privilege for the jury. Restatement (Second) of Torts, an authority that is followed in the District of Columbia, *Harmon* v. *Liss,* 116 A.2d 693 (D.C. Mun. 1955); Restatement (Second) of Torts §569, Comment b (Tent. Draft No. 21, April 5, 1975) suggests that the only

effect of a finding that a publication is libelous *per se* is to place the burden of establishing truth or privilege on the defendant; and recognizes that liability may be imposed only on a showing that defendant actually knew of the falsity and defamatory nature of his statements, or recklessly disregarded the truth, or acted negligently in failing to ascertain the facts. Based on these principles, it is clear that in the District of Columbia, neither the press release and newsletters nor the statements attributed to Senator Proxmire or members of his staff constitute actionable libel or defamation.

This conclusion is supported by the unmet averments of Mr. Schwartz and those of persons in state and federal agencies with whom he spoke during his investigation of Dr. Hutchinson's federal funding; but particularly, by the recognition in the District of Columbia of a defense to an action for defamation based on the doctrine of fair comment. In *Fisher* v. *Washington Post Co.*, 212 A.2d 335 (D.C. Ct. App. 1965), an action by an art gallery owner against a newspaper based on allegedly libelous comments about the manner in which the gallery presented its paintings, the court held that the doctrine of fair comment was applicable. The court defined the doctrine:

> "Fair comment or criticism on a matter of public interest is not actionable so long as the comment is not motivated by malice . . . . So long as the comment is the speaker's actual opinion, based on fact, about a matter of public interest, the words are protected unless they are grounded in malice or go beyond a discussion of the public works or acts of the subject of the opinion. . . . Fair comment is a complete defense . . . and the words are not made actionable by the fact that the complaining party is injured in his business reputation. . . . The fair comment defense goes only to opinions expressed by the writer and does not extend to misstatements of fact." *Id.* at 337.

In the case here, the fair comment doctrine is a complete defense to Dr. Hutchinson's action with regard to the statements contained in the April 1975 press release and the newsletters. The disposition of public funds is clearly a matter of public interest; and the opinions expressed were based on facts researched by Senator Proxmire's assistant, the defendant, Mr. Schwartz. Under these circumstances, the release and newsletters did not have to include all the facts on which the opinions were based, "[s]o long as the facts are available to the public, the criticism is within the doctrine of fair comment." *Fisher* v. *Washington Post Co.*, 212 A.2d 335, 338 (D.C. Ct. App. 1965).

It is also clear that in the District of Columbia the brief and innocuous statement Senator Proxmire made on the Mike Douglas Show did not constitute defamation, nor did any of the other statements about which Dr. Hutchinson complains. The law of the jurisdiction requires that in a suit for defamation there be proof of certainty as to the person defamed before liability can be imposed. Restatement of Torts §564(b) (1938). The person defamed need not be specifically named; but the surrounding circumstances must be such that there is no doubt in the hearer's mind as to the person's identity. *Harmon* v. *Liss*, 116 A.2d 693, 695 (D.C. Mun. App. 1955), citing Restatement of Torts §564(b). In this case, the statement on the Mike Douglas Show did not name Dr. Hutchinson or even describe him with the clarity that would suggest a jury verdict against Senator Proxmire. The other statements were similarly innocuous.

Under the law of Michigan, Dr. Hutchinson fares no better. That state recognizes a rule of qualified privilege for all *bona fide* communications concerning any subject in

which the party communicating has an interest, or in reference to which he has a legal, moral or social obligation to a person having a corresponding interest or duty. *Timmis* v. *Bennett,* 352 Mich. 335, 89 N.W.2d 748, 753 (1958); *Bufalino* v. *Maxon Bros., Inc.,* 368 Mich. 140, 117 N.W.2d 150 (1962). This rule was applied in *Timmis* v. *Bennett, supra,* an action by a police officer against an attorney for libel in a letter referring to conduct of the city's law enforcement. The court found that the rule included "statements made in good faith by a citizen . . . having, or claiming to have, special knowledge . . . bearing on [a] matter of public concern and communicated to others concerned or interested." 89 N.W.2d at 755. The court explained the procedural consequences of a finding of qualified privilege, saying,

> "The meaning in law of a privileged communication is that it is made on such an occasion as rebuts the *prima facie* inference of malice arising from the publication of matter prejudicial to the character of the plaintiff, and throws upon him the *onus* of proving malice in fact, but not of proving it by extrinsic evidence only. . . . The effect, therefore, of showing that the communication was made upon privileged occasion is *prima facie* to rebut the quality . . . of malice [in law] and casts upon the plaintiff the necessity of showing malice in fact, — that is, that the defendant was actuated by ill will in what he did and said, with a design to causelessly or wantonly injure the plaintiff, — and this malice in fact, resting, as it must, upon the libelous matter itself and the surrounding circumstances tending to prove fact and motive, is a question to be determined by the jury. The question whether the occasion is such as to rebut the inference of malice if the communication be *bona fide* is one of law for the court, but whether *bona fides* exist is one of fact for the jury, [citations omitted] *Id.* at 753-54;

> accord *Harrison* v. *Arrow Metal Products Co.,* 20 Mich. App. 590, 174 N.W.2d 875 (1969).

Timmis indicates that the doctrine of qualified privilege applies in Michigan for the same reasons that the doctrine of fair comment applies in the District of Columbia. Thus, the burden is on Dr. Hutchinson to resist the motion for summary judgment by showing that in the trial of this case there will be evidence of malice in fact or ill-will. He cannot simply rest on his pleadings, but must make this showing once it is established that the occasion in question was privileged. In *Nuyen* v. *Slater,* 372 Mich. 654, 127 N.W.2d 369, 373 (1964), where summary judgment for defendant was affirmed, the Supreme Court of Michigan said that "[i]f the circumstances relied on as showing malice are as consistent with its nonexistence as with its existence, the plaintiff has not overcome the presumption of good faith [established by defendant's showing of a qualified privilege] and there is nothing for the jury." No such showing has been made here by Dr. Hutchinson with regard to the press release or the newsletter.

As to the statement made on the Mike Douglas Show, and those claimed by Dr. Hutchinson to have been made on other occasions, it appears that the law of Michigan, like that of the District of Columbia, requires certainty as to the person allegedly defamed before liability may be imposed. In *Lewis* v. *Soule,* 3 Mich 514, 521 (1855), the Supreme Court of Michigan said that

> "[T]he true test is . . . whether those who are acquainted with the person libelled, upon hearing the charge, are able to make the application. . . . Men generally talk, and write, to be understood; and when they design to speak of and concerning an individual, they either refer to him by name, or connect him with some fact or circumstances, by which those addressed, un-

derstood who is to be designated. That fact or circumstances must be known by those to whom the communication is made; otherwise, nothing is communicated."

V.

It follows, then, that in this summary judgment proceeding, the motion, pleadings, depositions, exhibits, and affidavits disclose there is no genuine issue of material fact to be resolved between the parties. The conduct about which Dr. Hutchinson complains is admitted by the defendant, Senator Proxmire. On the facts alleged in the complaint, indeed the only facts on which the plaintiff can base any claim for relief, it matters not whether he was a public figure, a public official or a private person. Therefore, this court concludes that defendant is entitled to judgment as a matter of law; and this is true whether the law applied in this case is that of federal jurisdictions, the District of Columbia where the conduct complained of originated, or that of the state of Michigan where Dr. Hutchinson lives and the claimed injury presumably was felt. *Bon Air Hotel Inc.* v. *Time, Inc.*, 426 F.2d 858 (5th Cir. 1970); *Perry* v. *Columbia Broadcasting System, Inc.*, 499 F.2d 797 (7th Cir. 1974); *Washington Post Company* v. *Keogh*, 365 F.2d 965 (D.C. Cir. 1956); *Nuyen* v. *Slayter*, 372 Mich. 654, 127 N.W.2d 369 (1964).

Accordingly, summary judgment will be entered in favor of the defendant Senator William Proxmire and against the plaintiff Dr. Ronald R. Hutchinson. And since on the facts alleged a claim cannot be stated on which relief can be granted against the remaining defendant, Mr. Morton Schwartz, this court serves notice on the plaintiff that because of the inadequacy of the complaint, it will, on its own initiative, dismiss the suit as to Mr. Schwartz, unless a showing is made within 30 days that such dismissal should not be ordered. *Literature, Inc.* v. *Quinn*, 482 F.2d 372

(1 Cir. 1973); *Dodd* v. *Spokane County, Washington*, 393 F.2d 330 (9th Cir. 1968).

So ordered

(s) George N. Leighton

Dated: April 22, 1977

APPENDIX A

Office of
SENATOR WILLIAM PROXMIRE
Wisconsin

FOR RELEASE AFTER 6:30 A.M. FRIDAY,
APRIL 18, 1975

Senator William Proxmire (D. Wis) announced on Friday, "My choice for the Golden Fleece Award for the biggest waste of taxpayers' money for the month of April goes jointly to the National Science Foundation, National Aeronautics and Space Administration and the Office of Naval Research for spending almost $500,000 in the last seven years to determine under what conditions rats, monkeys and humans bite and clench their jaws. From the findings of these studies it is clear that the Government paid a half million dollars to find out that anger, stopping smoking, and loud noises produce jaw clenching in people."

The Wisconsin Senator said, "This is the second in a series of 'fleece of the month' awards which will climax in a Biggest Waste of the Year Award.

"All this money was given to Dr. Roland R. Hutchinson of Kalamazoo State Hospital in Michigan. Last year alone the good doctor spent over $200,000 of which more than $100,000 were federal funds. And what are some of the other results reached by these research projects in the last seven years?

"Dr. Hutchinson told NASA that people get angry when they feel cheated and tend to clench their jaws or even scream and kick. NSF learned that Dr. Hutchinson's monkeys became angry when they were shocked and would try to get away from the shock. In addition, NSF was informed that drunk monkeys do not usually react as quickly or as often as sober monkeys and that hungry monkeys get angry more quickly than well-fed monkeys.

"The Office of Naval Research appears to have gotten the same type of so-called research as did the NSF and NASA.

"It is very interesting to trace the history of these extremely similar and perhaps duplicative projects. In 1967, NSF gave Dr. Hutchinson $44,700 to study 'Environmental and Physiological Causes of Aggression.' For two years, Dr. Hutchinson studied the biting reactions of monkeys when they received electric shocks. He also compared their reaction while being given a number of different drugs as alcohol and caffeine. In 1969, the NSF gave Dr. Hutchinson another $26,000 to continue these experiments. He received another grant, this one for $51,200 in 1970 from the NSF.

"By this time Dr. Hutchinson was ready to extend his work to human biting and jaw clenching. In 1970, Dr. Hutchinson received a grant which ran for five years from the ONR to continue 'research on subhuman primates to determine the environmental, physiological and biochemical factors responsible for the maintenance of aggressive behavior and systematic replication of results obtained in

primates extended to human subjects.' Total funding from the Navy ran to $207,000.

"During this period, Dr. Hutchinson applied for and received a $50,000 grant from NASA to develop measurements of latent anger or aggression in humans by means of jaw-clenching. In addition, Dr. Hutchinson received his fourth NSF grant in 1972 for $51,800 in order to continue his experiments on monkeys and extend the work to human jaw-clenching.

"Dr. Hutchinson, who in addition to being Research Director at Kalamazoo State Hospital, is also an Adjunct Professor at Western Michigan University and President of his own non-profit Foundation for Behavior Research, has proposals presently pending before the NSF, the National Institute of Drug Abuse, and the National Institute of Mental Health to continue research on monkeys' drinking, drug and jaw clenching habits. If Dr. Hutchinson is successful in this new grantmanship attempt, he would receive an additional $150,000 of taxpayers' money.

"The funding of this nonsense makes me almost angry enough to scream and kick or even clench my jaw.

"Dr. Hutchinson's studies should make the taxpayers as well as his monkeys grind their teeth. In fact, the good doctor has made a fortune from his monkeys and in the process made a monkey out of the American taxpayer.

"It's time for the federal government to get out of this 'monkey business.' In view of the transparent worthlessness of Hutchinson's study of jaw-grinding and biting by angry or hard-drinking monkeys, it's time we put a stop to the bite Hutchinson and the bureaucrats who fund him have been taking out of the taxpayer."

Proxmire said that the public is urged to write him in Washington with suggestions for the "Golden Fleece of the Month" for May.

APPENDIX B — Opinion Of The United States Court of Appeals For The Seventh Circuit Dated June 30, 1978.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Nos. 77-1677 and 77-1755
RONALD R. HUTCHINSON,

Plaintiff-Appellant,

v.

WILLIAM PROXMIRE and MORTON SCHWARTZ,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Wisconsin. No. 76-C-257.
George N. Leighton, *Judge*
Northern District of Illinois, sitting by designation.

ARGUED JANUARY 9, 1978 — DECIDED JUNE 30, 1978

Before CASTLE, *Senior Circuit Judge,* WOOD, *Circuit Judge,* and EAST, *Senior District Judge.**

CASTLE, *Senior Circuit Judge.* This civil suit against a United States Senator and his legislative aide for damages arising from one of the Senator's monthly "Golden

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* Honorable William G. East, Senior United States District Judge for the District of Oregon, is sitting by designation.

Fleece" awards involves the interplay of the immunities provided by the Speech or Debate Clause and the first amendment. The issues on appeal are (1) whether the alleged activities of the congressional defendants were within the legitimate legislative sphere and thus absolutely immune from suit and (2) to the extent those activities are not absolutely protected by the Speech or Debate Clause, whether the statements complained of are protected by the qualified privilege of the first amendment. The district court found that the combination of the absolute and qualified immunities completely shielded the defendants and granted their motion for summary judgment. We affirm.

I.

The facts as alleged by plaintiff are fully stated in the opinion below. *Hutchinson v. Proxmire,* 431 F. Supp. 1311 (W.D. Wis. 1977), and will be briefly summarized here. Defendant William Proxmire is a United States Senator from Wisconsin who serves on the Senate Committee on Appropriations. In March, 1975, Senator Proxmire announced in a speech on the Senate floor that he was establishing his "Golden Fleece of the Month Award" the aim of which was to point out examples of wasteful government spending. Senator Proxmire's legislative aide, Morton Schwartz, was assigned to identify and investigate possible "Fleece" candidates.

After a review of agency documents and discussions with the various agencies' officials, the defendants decided they would give a Golden Fleece award to the National Science Foundation (NSF), the Office of Naval Research (ONR), and the National Aeronautics and Space Administration (NASA) for spending $500,000 to fund research by plaintiff Dr. Ronald Hutchinson into the causes of animal and human aggression. Defendants delivered a press release to the Senate Service Depart-

ment on April 15, 1975 for release April 18 which, in essence, was the text of a speech scheduled to be given before the Senate by Senator Proxmire on April 18.[1] In his speech, Senator Proxmire characterized the research as merely studying why "rats, monkeys and humans bite and clench their jaws." Also, on or about April 15, 1975, Schwartz telephoned Dr. Hutchinson to inform him of the upcoming award and to verify the information contained in the speech. In rebuttal, Dr. Hutchinson then issued his own press release also dated April 18, 1975. In May, 1975, Senator Proxmire sent approximately 100,000 newsletters to his constituents and others summarizing the Golden Fleece Award.[2] Later in 1975, in addition to other interviews, Senator Proxmire appeared on a Milwaukee radio show and the Mike Douglas television show to discuss the Golden Fleece Awards including the one given to NSF, ONR, and NASA.[3] Following the April 18, 1975 announce-

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[1] The press release is attached to this opinion as Appendix A.

[2] This newsletter is attached as Appendix B. A second newsletter repeated the substance of the first and stated that all funding of the studies involved had been ended.

[3] The relevant dialogue from the Mike Douglas Show is set forth below:

> Mike Douglas: You gave another award to a research project studying angry rats.
>
> Senator Proxmire: Well it was angry monkeys, rats and humans. It was a study that cost $500,000 to find out why people, rats and monkeys clench their jaws. They found out they clench their jaws when they were angry, when they were prodded by sticks, when they were hungry, and they didn't clench their jaws as much if they had been drinking.
>
> Mike Douglas: You know we're laughing at this but this is really really.
>
> Senator Proxmire: Oh it's terrible.

ment of the award, plaintiff alleges defendant Schwartz made several followup phone calls to NSF, ONR, and the National Institute of Drug Abuse (NIDA), and possibly other agencies, encouraging them to terminate the funding of Dr. Hutchinson's research.

Dr. Hutchinson filed this action seeking $8,000,000 in damages for injury to his reputation, for physical illness, mental distress, invasion of privacy, and loss of existing and prospective economic advantage. Defendants, claiming immunity from suit, moved for summary judgment and filed numerous supporting documents. Plaintiff opposed the motion with equally voluminous documentation. The district court, in a scholarly opinion, granted Senator Proxmire's motion for summary judgment and later dismissed the suit against Schwartz. This appeal followed.[4]

II.

Several recent cases have interpreted the scope of the absolute immunity provided legislators and their aides

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[4] The district court granted Senator Proxmire's motion for summary judgment on April 22, 1977 (77-1677) and the motion to dismiss defendant Schwartz on June 22, 1977 (77-1755). As stated below, see note 5 *infra*, since we find the legal status of the defendants to be identical, we affirm both rulings for the same reasons.

We note that in cases involving the assertion of the immunities raised here, dismissal or summary judgment, when proper, is necessary to prevent the possible harassment of a full-fledged lawsuit; the precise harassment the legislative and first amendment immunities were designed to prevent. *See Dombrowski* v. *Eastland,* 387 U.S. 82, 85 (1967) (Speech or Debate Clause protects legislators from the burden of defending against a lawsuit as well as from the results of the lawsuit); *Grzelak* v. *Calumet Publishing Co., Inc.,* 543 F.2d 579, 582 (7th Cir. 1975) (summary judgment minimizes the chilling effect libel suits have on first amendment rights).

under the Speech or Debate Clause in suits stemming from investigations.[5] While actual speech in either House is unquestionably protected, the Clause also protects other acts by representatives when those acts are found to be within the "legitimate legislative sphere." *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 503 (1975); *Gravel v. United States*, 408 U.S. 606 (1972).[6] The act of investigation is an "appropriate auxiliary to the legislative function" and legislators have been found to be within the legislative sphere when the subject of the investiga-

[5] *See* Comment, *McSurely* v. *McClellan: Civil Suits Under the Speech or Debate Clause*. 71 Nw.U.L.Rev. 783 (1977) [hereinafter cited as Northwestern Comment].

The Speech or Debate Clause states: "for any Speech or Debate in either House, they [members of Congress] shall not be questioned in any other Place." U.S. Const. art. I, §6. Generally, legislative aides are entitled to the same Speech or Debate Clause protection as the representatives they serve. *Gravel* v. *United States*, 408 U.S. 606, 618 (1972). In the present action, we view the immunity available to Senator Proxmire and his aide, Morton Schwartz, to be identical.

[6] The Court stated in *Gravel*:

> The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

408 U.S. at 625. *See generally* Reinstein & Silvergate. *Legislative Privilege and the Separation of Powers*, 86 Harv. L. Rev. 1113 (1973).

tion was one on which Congress could legislate and when the information sought from material witnesses furthered that subject. *McGrain v. Dougherty*, 273 U.S. 135, 174, 177 (1927); *Watkins v. United States*, 354 U.S. 178, 187 (1957).[7] However, even where the investigation is within the legislative sphere, absolute immunity does not attach to the improper dissemination of actionable information outside Congress, *Doe v. McMillan*, 412 U.S. 306, 316 (1973); *Gravel v. United States, supra* at 625, nor to illegal or unconstitutional acts committed during the investigation. *United States v. Brewster*, 408 U.S. 501, 526 (1972); *Dombrowski v. Eastland*, 387 U.S. 82 (1967).[8] Equipped with these basic principles, we will now determine if absolute legislative immunity bars suit upon the acts complained of by the plaintiff. For the purposes of analysis, we divide the allegations in this case into four separate acts: (1) the follow-up phone calls to administrative agencies; (2) the press release of the speech; (3) the newsletters; and (4) the television, radio, and other interviews.

[7] We find unpersuasive plaintiff's argument that these cases do not involve Speech or Debate immunity but only the power of Congress to investigate. Language from *McGrain* and *Watkins* is frequently used in Speech or Debate cases involving investigations as the test for application of legislative immunity. *E.g. Eastland v. United States Servicemen's Fund, supra* at 505-06; Northwestern Comment, *supra* note 5 at 788 n. 39.

[8] An example of a civil suit based upon claims of unconstitutional acts is *McSurely v. McClellan*, 553 F.2d 1277 (D.C. Cir. 1976) (en banc), *cert. dismissed as improvidently granted sub nom., McAdams v. McSurely*, ... U.S. .....; 46 U.S.L.W. ..... (June 26, 1978). It is not contended that the tort claims here are of constitutional dimensions. *See Paul v. Davis*, 424 U.S. 693 (1976).

1. *Follow-up Phone Calls to Agencies*

Plaintiff agrees that the investigative actions by defendants in gathering information on public spending from administrative agencies is not actionable under the Speech or Debate Clause since the investigation was within the legislative sphere. *McGrain v. Dougherty, supra.* However, Dr. Hutchinson argues that when the defendants made the phone calls to the agencies encouraging them to terminate the research grants, they exceeded the legitimate information gathering protected by legislative immunity. The phone calls, plaintiff alleges, were made for the purpose of influencing the agencies and not for the gathering of information. In response, defendants maintain that the follow-up contact with the agencies was part of the legislature's oversight function and thus should be accorded Speech or Debate protection.

The thrust of legislative immunity is the protection of the "deliberative and communicative processes" of representatives *Gravel v. United States, supra* at 625. It can be argued that each of the nonlegislative functions of Congress, *i.e.*, investigative, oversight, informing, assist representatives in their legislative deliberations and communications. However, the Supreme Court has specifically stated that contact with administrative agencies is normally too far removed from the legislative sphere to be absolutely protected:

> Members of Congress are constantly in touch with the Executive Branch of the Government and with administrative agencies — they may cajole, and exhort with respect to the administration of a federal statute — but such conduct, though generally done, is not protected legislative activity. *United States v. Johnson* [383 U.S. 169 (1966)] decided at least this much.

Gravel v. United States, supra, at 625. *See also McSurely v. McClellan, supra* note 8 at 1285-86. Thus, while there may be cases where the postinvestigation contact with administrative agencies is so integral to the investigation or other protected activities that application of absolute immunity would be compelled, the phone calls to NSF, NASA, and NIDA in this case cannot be accorded Speech or Debate protection.[9]

2. *Press Release, Newsletters, Television and Radio Comments*

To determine whether the remaining allegations of plaintiff are actionable under the Speech or Debate Clause, we must explore the limits of permissible public dissemination of information by a representative. The Supreme Court has rejected the argument that the "informing function" of Congress requires absolute immunity for all public distribution of information. *Doe v. McMillan, supra* at 316. *Doe* held that the Speech or Debate Clause protected representatives and their legislative aides from suit for voting to authorize the public distribution of an actionable committee report. However, the Court further held that absolute immunity was not automatically available to the Public Printer and Superintendent of Documents who actually distributed the report and remanded the case for a determination of whether the "legitimate

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[9] The district court did not specifically address the Speech or Debate status of the follow-up phone calls. It appears, however, that the court below viewed these actions as merely a part of the total investigation and therefore absolutely privileged. 431 F. Supp. at 1321-22. In light of the language in *Gravel,* we must disagree.

legislative needs" of Congress had been exceeded.[10] Thus, while the Supreme Court has recognized that the informing function of Congress is sufficiently important to warrant Speech or Debate immunity for some public dissemination of information, *Id.* at 317, 328 (Douglas, J., concurring), 333 (Blackmun, J., concurring and dissenting), 341 (Rehnquist, J., concurring and dissenting), the distribution outside Congress must serve legitimate legislative needs to afford the actual distributor absolute immunity. The key factor in determining the amount of distribution that is within legislative needs is the extent of the dissemination. *Id.* at 324.[11]

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[10] On appeal after demand, *Doe v. McMillan,* 566 F.2d 713 (D.C. Cir. 1977), *cert. denied,* 98 S.Ct. 1607 (1978), the D.C. Circuit upheld the district court's finding that the routine distribution of the actionable report "did not exceed the legitimate legislative needs of Congress." *Id.* at 715. *See also Gravel v. United States, supra* at 625 (Senator's direct arrangements with a private printer to publish classified information was "in no way essential to the deliberations of the Senate").

It appears that while the representatives and their legislative aides are automatically immune from suit when authorizing public dissemination of information, both can become subject to showing "legitimate legislative needs" if they actually distribute actionable material outside Congress. In the latter instance, representatives and their legislative aides are treated in the same manner as non-legislative functionaries such as the Public Printer. *See Doe v. McMillan,* 566 F.2d at 715 n.1. We assume, according to plaintiff's allegations, that defendants actually distributed the actionable materials here and cannot claim to have merely "authorized" their distribution.

[11] While the extent of the public dissemination was the only factor noted by the Supreme Court in *Doe,* implicit recognition was also given to the importance of the type

Following the particularized inquiry into the legislatively necessary extent of public distribution outlined in *Doe,* we agree with the district court that the press release in this case was protected by absolute immunity. It is uncontested that the release, which is virtually identical to the speech by Senator Proxmire, was routinely distributed to the Senator's general media list which was placed on file in the Senate Service Department (Shuman Affidavit ¶¶ 8-11). The release merely served to call attention to the speech which was in the public record.[12] Given the enormous amount of material addressed by Congress each day, strategic press releases may serve to alert a representative's colleagues about a matter of particular importance as well as to inform the appropriate federal agencies and the public who can then comment on proper legislative action. We find the limited facilitation of press coverage of congressional action in this case to be protected by the Speech or Debate Clause. *Cf. Consumer's Union of United States, Inc. v. Periodical Correspondents' Association,* 515 F.2d 1341, 1350-51 (D.C. Cir. 1975), *cert. denied,* 423 U.S. 1051 (1976) (management of congression-

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[11] (Continued):
of information being distributed; *i.e.,* committee reports, floor speeches, proposed legislation. Presumably, certain types of information would require greater public distribution to properly serve legislative needs.

[12] Plaintiff claims the press release, dated April 18, 1975, was actually made public April 15, three days before the speech. Assuming, as we must, that plaintiff is correct, we do not see how the timing of the release affects this case. There is no claim that Senator Proxmire attempted to create absolute immunity after the fact by reading the release in the Senate. The wording of the press release belies any such contention.

al press galleries, though entrusted to private association, is protected by the Speech or Debate Clause).[13]

We also find that the Speech or Debate Clause protects any otherwise actionable material contained in newsletters mailed to Senator Proxmire's constituents. As noted above, the informing function of Congress was given limited Speech or Debate protection by the Supreme Court in *Doe v. McMillan, supra.* If the informing function, even though limited, is to be accorded any absolute immunity, it must be in a case such as this. Senator Proxmire's newsletter informed his constituents of his actions in connection with overseeing public funds which were part of his general duties as a Senator and his particular responsibilities as a member of the Senate Committee on Appropriations. Denying a representative protection for newsletters to his constituents in circumstances such as this would effectively isolate the legislator from the people who elected him. *Id.* at 333 (Blackmun, J., concurring and dissenting). The subject matter and language of the newsletter make this case factually distinct from *Doe. Id.* at 328-29 (Douglas, J., concurring).

However, any defamatory remarks made by Senator Proxmire in television, radio, and other interviews are

[13] The district court held that the "press release, in a constitutional sense, was no different than would have been a television or radio broadcast of his speech from the Senate floor." 431 F.Supp. at 1325. This statement might be an overstatement since it is unlikely that all exact duplications of congressional speeches would enjoy the unquestioned absolute immunity accorded actual speech in the House or Senate. See note 6 *supra.* However, we agree with the district court that the form of distribution of the questioned material has an effect upon the extent to which its dissemination can still be considered to serve legislative needs.

not protected by absolute immunity. We view this form of public dissemination of information, absent special circumstances, to be too far removed from serving legitimate legislative needs to be within the limited reach of the protected informing function. Such methods of reaching the public are generally not necessary to carry out a representative's informing function and are more frequently used for political purposes. *United States v. Brewster, supra* at 512. While there might be a case where distributing actionable information through television and radio interviews would be viewed as serving legislative needs, the type of distribution alleged here does not suggest that situation.

Finding that television and radio interviews and the follow-up telephone conversations with administrative agencies urging the cut-off of funds are not absolutely immune under the Speech or Debate Clause, we must now determine whether the statements made in those communications are protected by the qualified privilege of the first amendment right to free speech.

III.

Regarding the statements which were unprotected by an absolute Speech or Debate immunity, the court below after careful analysis, found (1) that Dr. Hutchinson was both a public official and public figure and there was no showing of "actual malice" under the doctrine of *New York Times v. Sullivan,* 376 U.S. 254 (1964) and (2) that even if Dr. Hutchinson was a private person, the statements did not constitute defamation under the applicable local law. 431 F. Supp. 1325-33. After having independently examined the record, *Fadell v. Minneapolis Star and Tribune Co., Inc.,* 557 F.2d 107, 108 (7th Cir.), *cert. denied,* 98 S. Ct. 508 (1977), we agree with the district court that summary judgment was proper based upon first amend-

ment grounds. Consequently, we need not decide whether the statements were actionable defamation under local law.

We agree with the district court that Dr. Hutchinson is a public figure and consequently must show that any false, defamatory statements were made with "actual malice," *i.e.*, actual knowledge that the statements were false or reckless disregard of their truth or falsity. *New York Times v. Sullivan, supra* at 279-80. *See Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967). Public figures are those who (1) have the appropriate status which either exists by their position alone or is achieved by their voluntarily thrusting themselves into the " 'vortex' of an important public controversy" and (2) have "sufficient access to the means of conterargument to be able to 'to expose through discussion the falsehood and fallacies' of the defamatory statements." *Id.* at 155. While government employees and contractors by their positions alone do not generally have such "persuasive power and influence that they are deemed public figures for all purposes," *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 345 (1974), the nature and extent of an individual's participation in the particular matter may make him a public figure for that issue. *Id.* at 352.

Here, there is no question that Dr. Hutchinson had actively solicited federal grants to pursue his research and had secured a substantial amount of public funds by his applications. (Defendants' Exhibits 82b, 83). The plaintiff had also published numerous articles regarding his work (Plaintiff's Exhibits 64-96), and stories regarding his research had appeared several times in local papers. (Defendants' Exhibits 47-51). In addition to his public status as to his research, it is evident from the record that plaintiff had sufficient access to the media to rebut any defamatory falsehood. Dr. Hutchinson's answering press release was quoted in detail in the same stories

which initially reported the Golden Fleece Award. (Plaintiff's Exhibits 32-39). Thus, Dr. Hutchinson had the appropriate status and access to the means of rebuttal to be considered a public figure with regard to the propriety of his research. *See Adey v. United Action for Animals, Inc.,* 361 F. Supp. 457, 460 (S.D.N.Y. 1973), *aff'd,* 493 F.2d 1397 (2d Cir.), *cert. denied,* 419 U.S. 842 (1974) (NASA research scientist is public figure).[14]

Having found the plaintiff to be a public person and therefore subject to the *New York Times* standard, the district court granted summary judgment after finding that there was no issue of material fact as to whether the defendants had actual malice. 431 F. Supp. 1329-30. In order to show actual malice, plaintiff must prove by clear and convincing evidence that defendants had actual knowledge of the falsity of their statements or that defendants acted with a "high degree of awareness of . . . probable falsity." *St. Amant v. Thompson,* 390 U.S. 727, 730-31 (1968), *Gertz v. Robert Welch, Inc., supra* at 342. We agree with the district court that, upon this record, there

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[14] In light of our decision that Dr. Hutchinson is a public figure, we need not decide whether the district court was correct in holding that plaintiff was also a public official. 431 F.Supp. at 1327.

Time, Inc. v. Firestone, 424 U.S. 448 (1976), cited by plaintiff, is factually distinct from the present case. There, the Court found that Mrs. Firestone was not a public figure since she did not thrust herself into the forefront of a public controversy in order to influence its reolution by her divorce proceedings and related press conferences. *Id.* at 454 & n.3. In contrast, here Dr. Hutchinson was not forced to seek public funds and plaintiff's numerous articles and news stories which preceded his rebuttal press release demonstrate his public affirmation of the soundness of the research and the continued public funding thereof. *See also Gertz v. Robert Welch, Inc., supra* at 345.

is no question that defendants did not have knowledge of the actual or probable "falsity" of their statements.[15]

Dr. Hutchinson's main argument in this regard is that while failure to fully investigate generally does not establish reckless disregard for the truth, *St. Amant v. Thompson, supra,* defendants were on notice of the possible falsehoods since they possessed agency reports supporting the type of research and its cost. (ONR letter, Plaintiff's Exhibit 9 to Shuman Deposition.) In contrast, defendants' exhibits include correspondence from agencies which criticize plaintiff's research technique and project costs. (Defendants' Exhibit 90.) At best, this could be read to show there was a dispute as to the value of the research. This dispute by itself, however, is not sufficient to raise a question of material fact as to whether defendants had knowledge that their statement of opinion regarding the value of the research was actually or probably "false." In addition, it is unchallenged that defendants spent many hours investigating and verifying their information. (Schwartz Affidavit ¶¶ 10-20.) Defendants even telephoned Dr. Hutchinson before the press release was issued to inform him of its content. (Hutchinson Deposition pp. 389-90.) Defendants can also point to their extensive researching of Dr. Hutchinson's application for federal grants and contracts as support for their opinions regarding plaintiff's "grantsmanship." (Defendants' Exhibits 82b, 83.) Under these circumstances, plaintiff has not presented facts which could demonstrate that defendants acted with a "high degree of awareness of . . . probable falsity." *St. Amant v. Thompson, supra* at 730-31. Therefore, we find that there is no genuine issue as to whether the defendants had actual malice in the constitutional sense and that summary action by the district court was proper. *See Grzelak v. Calumet Publishing Co. Inc., supra* note 4 at 583.

Finally, plaintiff argues that even though the first amendment may shield the defendants from liability for defamation, the district court erred in not allowing a trial upon the other wrongs alleged in the complaint, *i.e.,* interference with contractual relations, intentional infliction of emotional anguish, and invasion of privacy. We view these additional allegations of harm as merely the results of the statements made by the defendants.[16] If the alleged defamatory falsehoods themselves are privileged, it would defeat the privilege to allow recovery for the specified damages which they caused.

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[15] We note that the statements in the interviews constitute a personal opinion as to the value of plaintiff's work, rather than false statements of fact and thus may not be defamatory in a constitutional sense. *See Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler,* 398 U.S. 6, 14 (1970). While the statements in the press release intimating that Dr. Hutchinson had made a personal fortune and that the research was "perhaps duplicative" may be defamatory falsehoods, that document, together with the newsletters, is absolutely immune under the Speech or Debate Clause. See Part II *supra.* In any event, we find the allegedly defamatory statements, including any action which may be premised on the documents being misleading, to be privileged under the first amendment.

[16] Although the harm caused by the follow-up phone calls might be argued to be independent of the defamatory statements, we see no constitutional distinction in their treatment. The torts allegedly stemming from the phone calls, interference with contractual relations and interference with prospective advantage, are based upon "malice" or other improper intent. W. Prosser, Law of Torts, §§ 129, 130 (4th ed. 1971). Where the constitutional right to free speech is involved, as it is here, the *New York Times* standard would be applicable to such an intent inquiry.

For the reasons stated above, the judgments of the district court are

AFFIRMED.

APPENDIX A

April 18, 1975 Press Release

Office of

SENATOR WILLIAM PROXMIRE

Wisconsin

FOR RELEASE AFTER 6:30 A.M. FRIDAY, APRIL 18, 1975

Senator William Proxmire (D.—Wis) announced on Friday, "My choice for the Golden Fleece Award for the biggest waste of taxpayers' money for the month of April goes jointly to the National Science Foundation, National Aeronautics and Space Administration and the Office of Naval Research for spending almost $500,000 in the last seven years to determine under what conditions rats, monkeys and humans bite and clench their jaws. From the findings of these studies it is clear that the Government paid a half million dollars to find out that anger, stopping smoking, and loud noises produce jaw clenching in people."

The Wisconsin Senator said, "This is the second in a series of 'fleece of the month' awards which will climax in a Biggest Waste of the Year Award.

"All this money was given to Dr. Roland [sic] R. Hutchinson of Kalamazoo State Hospital in Michigan. Last year alone the good doctor spent over $200,000 of which more than $100,000 were federal funds. And what are some of the other results reached by these research projects in the last seven years?

"Dr. Hutchinson told NASA that people get angry when they feel cheated and tend to clench their jaws or even scream and kick. NSF learned that Dr. Hutchinson's monkeys became angry when they were shocked and would try to get away from the shock. In addition, NSF was informed that drunk monkeys do not usually react as quickly or as often as sober monkeys and that hungry monkeys get angry more quickly than well-fed monkeys.

"The Office of Naval Research appears to have gotten the same type of so-called research as did the NSF and NASA.

"It is very interesting to trace the history of these extremely similar and perhaps duplicative projects. In 1967, NSF gave Dr. Hutchinson $44,700 to study 'Environmental and Physiological Causes of Aggression.' For two years, Dr. Hutchinson studied the biting reactions of monkeys when they received electric shocks. He also compared their reaction while being given a number of different drugs as alcohol and caffeine. In 1969, the NSF gave Dr. Hutchinson another $26,000 to continue these experiments. He received another grant, this one for $51,200 in 1970 from the NSF.

"By this time Dr. Hutchinson was ready to extend his work to human biting and jaw clenching. In 1970, Dr. Hutchinson received a grant which ran for five years from the ONR to continue 'research on subhuman primates to determine the environmental, physiological and biochemical factors responsible for the maintenance of aggressive behavior and systematic replication of results obtained in primates extended to human subjects.' Total funding from the Navy ran to $207,000.

"During this period, Dr. Hutchinson applied for and rereceived a $50,000 grant from NASA to develop measurements of latent anger or aggression in humans by means of jaw-clenching. In addition, Dr. Hutchinson received

his fourth NSF grant in 1972 for $51,800 in order to continue his experiments on monkeys and extend the work to human jaw-clenching.

"Dr. Hutchinson, who in addition to being Research Director at Kalamazoo State Hospital, is also an Adjunct Professor at Western Michigan University and President of his own non-profit Foundation for Behavior Research, has proposals presently pending before the NSF, the National Institute of Drug Abuse, and the National Institute of Mental Health to continue research on monkeys' drinkink, drug and jaw clenching habits. If Dr. Hutchinson is successful in this new grantsmanship attempt, he would receive an additional $150,000 of taxpayers' money.

"The funding of this nonsense makes me almost angry enough to scream and kick or even clench my jaw.

"Dr. Hutchinson's studies should make the taxpayers as well as his monkeys grind their teeth. In fact, the good doctor has made a fortune from his monkeys and in the process made a monkey out of the American taxpayer.

"It's time for the federal government to get out of this 'monkey business.' In view of the transparent worthlessness of Hutchinson's study of jaw-grinding and biting by angry or hard-drinking monkeys, it's time we put a stop to the bite Hutchinson and the bureaucrats who fund him have been taking out of the taxpayer."

Proxmire said that the public is urged to write him in Washington with suggestions for the "Golden Fleece of the Month" for May.

APPENDIX B

May, 1975 Newsletter

ROMANTIC LOVE STUDIED

Each month I have decided to offer a "golden fleece" award to the organization or person who has most utterly wasted your tax dollars.

Last month's award went to the National Science Foundation for a study of why people fall in love. For $84,000 the researchers were supposed to find out how people grow dependent upon each other in what they called "romantic love."

Not only is this a question that cannot be answered, like what is infinity, I'm not sure we want an answer. There should be some mysteries in life.

A BITE OUT OF YOUR POCKETBOOK

This month the award is shared jointly by the National Science Foundation, National Aeronautics and Space Administration and the Office of Naval Research. These three organizations have put up $500,000 of your tax money to reach the astounding conclusion that people and monkeys clench their jaws when angry or forced to stop smoking or confronted with loud noise.

In seven years of work by Dr. Ronald R. Hutchinson of Michigan, your money was used to discover that people get angry when they feel cheated and they tend to clench their jaws or even scream and kick. Did you know that? Did you know that monkeys become angry when they are given electric shocks? Or that drunk monkeys do not react as quickly as sober monkeys? That's what your taxes paid for!

Dr. Hutchinson has received one grant after another from various federal bureaucracies to study these earth shaking problems. He has examined crayfish, wasps, boa constrictors, turtles, alligators, opossums, foxes, pigeons, rats, monkeys and humans to discover under what circumstances they show signs of being angry.

TESTS ON ANIMALS

He has "stimulated" the animals by using physical blows, electric tail shocks, intense heat, brain probing, air blasts, foot shocks and loud noises. He has influenced them with morphine, tranquilizers, food, alcohol, caffeine and in the case of humans, with money.

He graduated from animals to humans in 1970. That's when he began to conclude that humans bite and clench their jaws under stress. And that when they feel cheated, they react by screaming and kicking on occasions.

These studies are continuing and several new proposals, if accepted, will mean another $150,000 for this program.

If this use of your tax money makes you want to kick and scream or clench your jaws, then join the club. The good doctor has made a monkey out of the federal bureaucrats.

I've told these government agencies it's time to get out of this "monkey business" and put an end to worthless studies be they scientific or social.

If you have any suggestions for my next "golden fleece" award, please write to me in Washington.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

Supreme Court, U. S.
FILED
MAR 8 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-680

RONALD R. HUTCHINSON,
Petitioner,

vs.

WILLIAM PROXMIRE and MORTON SCHWARTZ,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petition for Certiorari Filed October 20, 1978
Certiorari Granted January 8, 1979

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

RELEVANT DOCKET ENTRIES

File Number: 76 C 257

Date	*Proceedings*
4/16/76	Complaint.
4/16/76	Issued Summons.
4/29/76	Summons. (Proxmire)
6/11/76	Order that Judge Doyle is disqualifying himself from this action. certified copies mailed.
6/18/76	Designation of District Judge George N. Leighton, N.D. Illinois, for service in another district within circuit. certified copies mailed to counsel.
6/22/76	Complete file forwarded to Clerk, N.D. Illinois, certified mail.
7/6/76	Filed Motion of defendant Proxmire to dismiss or alternatively for Summary Judgment and brief in Support thereof and exhibits attached.
8/2/76	Filed defendants motion to dismiss on behalf of defendant Schwartz and two copies with certificate of service.
8/24/76	Entered order dated August 18, 1976: The defendants motion to transfer and motion to dismiss, or in the alternative, for summary judgment. The plaintiff is granted to and including October 18, 1976 for discovery. Answer to the defendant's motion and the filing of memo in opposition thereto shall be filed on or before

Date	*Proceedings*
	November 18, 1976. Reply thereto shall be filed on or before December 9, 1976. The court will rule on said motions on or before December 23, 1976 DRAFT (see draft for complete details) Leighton, J Notices mailed 8/24/76
8/30/76	Filed Plaintiff's first interrogatories to defendant William Proxmire and two copies.
9/16/76	Filed Plaintiff's demand for trial by jury with certificate of service and two copies.
9/16/76	Filed Defendant Proxmire interrogatories to plaintiff with Certificate of service and two copies.
9/16/76	Filed Defendant Proxmire request for production, inspection and copying of documents to Plaintiff with certificate of service and two copies.
9/27/76	Filed Defendant Proxmire's answers to plaintiff's first interrogatories, with attachment and two copies.
10/5/76	Issued summons and copy with copy of Complaint for service on Morton D. Schwartz.
10/5/76	Filed Plaintiff's request for production, inspection and copying of documents, with certificate of service and two copies.
10/13/76	Issued summons and two copies with two copies of Complaint for service on Morton Schwartz.
10/4/76	Filed Plaintiff's motion for leave of court to file Amended Complaint and two copies.
	Filed Memorandum in support of Plaintiffs motion for leave to file Amended Complaint and two copies with certificate of service.

Date	*Proceedings*
10/8/76	Filed Memorandum in opposition to defendant Schwartz's motion to Dismiss with certificate of Service and two copies.
10/8/76	Filed Defendant Proxmire's opposition to plaintiff's motion for leave to Amend Complaint with certificate of service and one copy.
10/18/76	Filed Plaintiff's answers to defendants' interrogatories to Plaintiff Ronald R. Hutchinson, and two copies.
10/20/76	Filed Response of defendant Proxmire to plaintiff's request for production, inspection and copying of documents, Certificate of Service with attachments 1 and 2 and two copies.
10/20/76	Filed deposition of Howard E. Shuman.
10/21/76	Filed defendants reply to plaintiff's opposition to defendant's motion to dismiss for want of jurisdiction, with affidavit of Alan Raywid, Certificate of Service with attachment, and two copies.
10/26/76	Filed deposition of Ronald R. Hutchinson in two volumes. (One envelope)
10/28/76	Filed Marshal's return of summons and complaint returned served on Morton D. Schwartz.
11/8/76	Filed deposition of Morton Donald Schwartz.
11/8/76	Filed deposition Senator William Proxmire (Above depositions in one envelope)
11/18/76	Filed Plaintiff's brief in opposition to defendant Proxmire's motion to dismiss or alternatively for Summary Judgment and two copies.
11/18/76	Filed Plaintiff's exhibits, 1-45, 46-50, 51-56, 57-63 and 64-96 in five volumes and two copies.

Date	*Proceedings*
11/19/76	Filed Plaintiff's supplemental Memorandum in opposition to defendant Schwartz's motion to dismiss for want of jurisdiction with certificate of service and two copies.
11/22/76	Filed Plaintiff's motion for extension of time to file answers to defendants motion to compel production of documents and answers to interrogatories and two copies.
11/22/76	Filed Certificate of Service re motion.
11/26/76	Filed Marshal's return of summons and complaint returned UNEXECUTED as to Morton Schwartz.
11/30/76	Filed Affidavit of Michael E. Cavanaugh and two copies.
12/6/76	Filed Defendant Schwartz's reply to plaintiff's supplemental memorandum in opposition to defendant Schwartz's motion to dismiss for want of jurisdiction with certificate of service and two copies.
12/9/76	Filed Affidavit of Richard Shannon and two copies with attachment 1 and 2.
12/9/76	Filed Defendant Proxmire's reply brief with exhibits 75, 76, 77, 78, 82a, 82b, 82c, 83 through 101 and two copies.
12/30/76	Entered order dated December 20, 1976. On October 4, 1976, the Plaintiff, Ronald R. Hutchinson, filed a motion under Rule 15, Federal Rules of Civil Procedure, for leave to amend his Complaint. The motion is granted. The Complaint as Amended will be treated by the Court as the complaint against which defendant William Proxmire has filed his motion to dismiss

Date	*Proceedings*
	or in the alternative, for Summary Judgment -Draft-Leighton, J. Mailed notices 12/30/76
1/3/77	Enter order dated December 23, 1976. Motion of the defendant William Proxmire to dismiss the Plaintiff's suit, or in the alternative, for Summary Judgment. The ruling will be on the alternative motion for Summary Judgment under Rule 56, Federal Rules of Civil Procedure. On or before the 27th day of January, 1977 the court will file a memorandum stating the reasons for its ruling. The order entered this day shall not be final until the memo is filed on said date summary judgment will be entered in favor of the defendant, William Proxmire, -Draft-Leighton, J Mailed notices 1/3/77
2/7/77	Enter order dated January 27, 1977; On motion of the court, the date for the filing of the court's Memorandum is extended to on or before April 27, 1977. Draft-Leighton. Mailed notices 2/7/77
4/25/77	Enter order dated April 22, 1977. In accordance with the Memorandum of the Court filed this day, Summary Judgment is entered in favor of defendant, Senator William Proxmire and against the plaintiff Dr. Ronald R. Hutchinson. Plaintiff is served notice that within 30 days, on its initiative, the court will dismiss this suit as to the remaining defendant Morton Schwartz unless plaintiff makes a showing within that time that such dismissal should not be ordered. -Draft-Leighton, J. Mailed notices 4/25/77
5/20/77	Filed plaintiff-appellant's notice of appeal. (**Rec. $5.00 5/26/77**)

Date	*Proceedings*
5/20/77	Transmitted copy of notice of appeal and copy of docket entries to U.S.C.A. 7th Circuit.
5/20/77	Mailed copy of notice of appeal to Bradway A. Liddle, Jr., P.O. Box 927, Madison, WI 53701; and Cole, Zylstra and Raywid, 2011 Eye Street N.W., Washington, D.C. 20006. ($250.00 bond on appeal with Cashier)
6/1/77	Filed appellants request for complete record
6/1/77	Filed plaintiff's notice; Proof of service
6/1/77	Filed Memorandum in opposition to motion to dismiss as to defendant Morton Schwartz
6/7/77	Filed Defendant Schwartz' reply to plaintiff's memorandum in opposition to dismiss as to defendant Morton Schwartz and two copies.
6/20/77	Filed plaintiff's reply to defendants reply to plaintiffs memorandum in opposition to motion to dismiss as to defendant Schwartz.
6/27/77	Enter order dated 6-22-77; in the memorandum filed in this cause on April 22, 1977, this court notified plaintiff that it was considering dismissing the suit as to defendant Schwartz because on the facts alleged a claim had not been made on which relief could be granted. Plaintiff has filed a memorandum opposing the dismissal. Defendant Schwartz has filed an answer to plaintiff's opposition. Plaintiff has filed a reply to defendant Schwartz' answer. After consideration of the parties' statements, the court finds that the amended complaint fails to state a claim on which relief can be granted against defendant Schwartz. Therefore, the suit is dismissed. -LEIGHTON, J. Mailed notices 6-28-77

Date	*Proceedings*
6/29/77	Transmitted complete record in one volume of pleadings, 5 volumes of plaintiff's exhibits and Item No. 7 unbound. (C/A No. 77-1677)
7/8/77	Filed request in form of letter from defendant's attorney to transmit additional documents in supplement to record on appeal.
7/11/77	Filed judgment on decision by the Court Rule 58 by Western District of Wisconsin
7/12/77	Transmitted in supplement to record the following: Proxmire's request for production, Summons issued on Morton D. Schwartz, (2), Plaintiff objections to interrogatories, 5 volumes of depositions, Marshal's return of summons unexecuted, and marshal's return of summons served on Schwartz, Affidavit of Michael E. Cavanaugh and Richard Shannon, Proxmire's reply brief with exhibits, defendant's exhibits incorporated with defendant's reply to plaintiff's memorandum; Order of 6-22-77 and request to supplement record.
7/18/77	Filed plaintiff's request to supplement the record on appeal
7/19/77	Transmitted in supplement to record on appeal the following: Plaintiff's reply to defendant's reply to plaintiff's memorandum in opposition to motion to dismiss as to defendant Morton Schwartz, with exhibits 97, 98, 99 and 100 and 101 attached, filed 6/20/77
7/22/77	Filed plaintiff's second notice of appeal $5.00
7/22/77	Filed copy of motion directed to U.S. Court of Appeals re: consolidation of appeals

Date	*Proceedings*
7/25/77	Transmitted supplement to U.S. Court of Appeals: Plaintiff's second notice of appeal, copy of motion to U.S. Court of Appeals to consolidate appeals

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

RELEVANT DOCKET ENTRIES

File Number: 77-1677

Date	*Proceedings*
7/29/77	Filed o&3c appellant's motion to consolidate two appeals, svc. (77-1755)
7/29/77	Entered order granting motion for consolidation of appeals. (77-1755)
9/6/77	Filed 15c of appellant's brief & 10c of appendix, svc. (77-1755)
10/4/77	Filed 15c appellees' brief & 15c appendix, svc. (77-1755)
10/21/77	Filed 15c appellant's reply brief, svc. (77-1755)
11/25/77	Entered order setting appeal for oral argument on Mon. 1/9/78 9:30 am. Oral argument limited to 20 min per/side.
1/9/78	Heard and taken under advisement.
6/30/78	Filed opinion by Judge Castle. (77-1755)
6/30/78	Entered final judgment order AFFIRMED, with costs. (77-1755)
7/14/78	Filed 25c appellant's petition for rehearing en banc, dist, svc. (77-1755)

Date	*Proceedings*
7/26/78	Entered order denying petition for rehearing. (77-1755)
10/30/78	Filed notice of filing petition for cert. on 10/20/78; Supreme Court No. 78-680.
11/17/78	MANDATE ISSUED AND RECORDED RETURNED. (77-1755)
11/22/78	Filed receipt for mandate and record from district court.
1979	
1/12	Entered order from Supreme Court granting petition for writ of cert. Case is set for oral argument in tandem with No. 78-5414, *Wolston* v *Reader's Digest Association*

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

RELEVANT DOCKET ENTRIES

File Number: 77-1755

Date	*Proceedings*
7/29/77	Filed o&3c appellant's motion to consolidate two appeals, svc. (77-1677)
7/29/77	Entered order granting motion for consolidation of appeals. (77-1677)
9/6/77	Filed 15c of appellant's brief & 10c of appendix, svc. (77-1677)
10/4/77	Filed 15c appellees' brief & 15c appendix, svc. (77-1677)
10/21/77	Filed 15c appellant's reply brief, svc. (77-1677)

Date	*Proceedings*
11/25/77	Entered order setting appeal for oral argument on Mon. 1/9/78 9:30 a.m. Oral argument limited to 20 min per/side.
1/9/78	Heard and taken under advisement.
6/30/78	filed opinion by Judge Castle. (77-1677)
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7/26/78	Entered order denying petition for rehearing. (77-1677)
10/30/78	Filed notice of filing petition for cert. on 10/20/78; Supreme Court No. 78-680.
11/17/78	MANDATE ISSUED AND RECORD RETURNED. (77-1677)
11/22/78	Filed receipt for mandate and record from district court.

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PREDICTION OF INAPPROPRIATE AGGRESSIVE BEHAVIOR OF MEMBERS OF SMALL CREWS, NOTICE OF RESEARCH PROJECT FOR CUSTER STATE HOME, 1970-71. DEFENDANTS' TRIAL EXHIBIT 70, U.S. DIST. CT., W.D. OF WISC.

Supporting Agency:

DEPARTMENT OF DEFENSE	DN923259
NAVY	CONTRACT

Title of Project:

PERSONNEL TECHNOLOGY—PREDICTION OF INAPPROPRIATE AGGRESSIVE BEHAVIOR OF MEMBERS OF SMALL CREWS

Principal Investigator, Associates and Department/ Specialty:

RR HUTCHINSON

Recipient Institution:	Period for this NRP:
FORT CUSTER STATE HOME	7/70 TO 6/71
P. O. BOX 248	FY71 FUNDS $32,000
AUGUSTA, MICHIGAN 49012	7-70 12-74

Summary of Project:

THE CAPABILITY TO CONTROL AND MODIFY AGGRESSIVE BEHAVIOR IN SITUATIONS IN WHICH THAT BEHAVIOR IS NOT APPROPRIATE WOULD BE VALUABLE IN MANY NAVY SITUATIONS IN WHICH PERSONNEL MUST INTERACT FOR RELATIVELY LONG PERIODS OF TIME, E.G. SHIPBOARD, SUBMARINE, OR PATROL AIRCRAFT. IDENTIFICATION OF THE FACTORS WHICH INDUCE AGGRESSIVE BE-

HAVIOR AND THE BODILY CHANGES WHICH PRODUCE CUMULATIVE EFFECTS AND PROLONG AGGRESSIVE REACTIONS IS A VITAL FIRST STEP IN ESTABLISHING CONTROL. THIS WORK UNIT IS CONCERNED WITH IDENTIFYING THE STIMULI WHICH PRODUCE AGGRESSIVE RESPONSES AND THE ACCOMPANYING BODILY CHANGES.

WORK IN THE COMING PERIOD WILL INVOLVE CONTINUATION OF RESEARCH ON SUBHUMAN PRIMATES TO DETERMINE THE ENVIRONMENTAL, PHYSIOLOGICAL AND BIOCHEMICAL FACTORS RESPONSIBLE FOR THE MAINTENANCE OF AGGRESSIVE BEHAVIOR, AND SYSTEMATIC REPLICATION OF RESULTS OBTAINED IN PRIMATES EXTENDED TO HUMAN SUBJECTS.

BECAUSE THE CONTRACT HAS ONLY RECENTLY STARTED NO EXPERIMENTAL RESULTS OR PAPERS HAVE BEEN PRODUCED. THE EXPERIMENTAL APPARATUS HAS BEEN SET UP, PROCEDURES ESTABLISHED, AND BOTH ANIMAL AND HUMAN SUBJECTS HAVE BEEN WORKED WITH. SEVERAL PRELIMINARY RUNS USING VARIOUS OF THE STANDARD TRANQUILIZERS, ANALGESICS, ANTIDEPRESSANTS AND ANTICONVULSANT DRUGS HAVE BEEN COMPLETED. PRELIMINARY RESULTS INDICATE THEY DO HAVE AN EFFECT ON THE LEVEL OF HYPERAGGRESSIVENESS, IN SOME INSTANCES INCREASING THE LEVEL, IN OTHERS DECREASING THE LEVEL.

SUPPORTING AGENCY ADDRESS INFORMATION: OFFICE OF NAVAL RESEARCH WASHINGTON, D.C. 20360

EXTRACT FROM "EXTENSION OF BASIC FINDINGS", A SUBSECTION OF PART B "BACKGROUND" FROM SEVERAL PROPOSALS FOR RESEARCH BY RONALD R. HUTCHINSON, PLAINTIFF'S TRIAL EXHIBITS 49, 50, 54, 55, 56 AND 59, U.S. DIST. CT., W.D. OF WISC.

The motivation behind each of the studies described so far has been to develop the base of biological knowledge required for an efficient and fruitful research program on the causes of human aggression.

Several studies of this investigation had shown the termination, blocking or interruption of appetitive or ingestive behaviors produces hostility and aggressive responses (Azrin, Hutchinson, and Hake, 1966; Hutchinson, Azrin and Hunt, 1968). Indeed, a relationship between frustration and aggression has been postulated for some time (Dollard et al., 1939). Large areas remain, however, for the objective and quantitative exploration of this phenomenon in humans. In the case of aggression and human biting, the dental literature has cited the role of psychic factors in bruxism, or non-functional gnashing and grinding of the teeth. Ramfjord and Ash (1966) note that emotional stress, pain, and discomfort are among the causes of increased tonus of the masticatory musculature that leads to bruxism. Teeth clenching and grinding have been associated with anger and aggression in humans and animals (Nadler, 1957).

To further explore these relationships, an automatic, sensitive, and reliable method of unobtrusively recording jaw contraction in humans has been developed (Hutchinson and Pierce, 1971). The intensity characteristics of the measures have been shown to be directly proportional

to contraction force, and the measures suitably differentiate between eccentric and concentric occlusal patterns. Automatic recording of these measures in digital format has also been perfected. Initial work has now confirmed that instatement of unpredictable and/or unrewarding conditions produces frequent and intense "non-functional" jaw contraction responses in humans. Subjects were rewarded for a button pushing task on a fixed-ratio schedule of delivery of points exchangeable for money. Ratio requirement was varied and occasionally extended periods of nonreward were arranged. Higher ratio requirements produced frequent intense jaw clenching just prior to work onset. Extinction produced extended jaw clenching episodes. These findings are essentially identical to those obtained with squirrel monkeys by Hutchinson, Azrin and Hunt (1968). These parallel results indicate that jaw clenching is produced by at least certain of the same stimuli which produce biting attack in animals.

Additional research was subsequently aimed at establishing that cessation of contact with certain habitually ingested chemical compounds would also produce jaw clenching. In this experiment (Hutchinson, Emley and Sauer, 1971), habitual smokers' jaw contractions were measured both before and for several weeks after cessation of all tobacco usage. Seven of eight subjects show prolonged and intense elevations in jaw clenching, frequency and intensity. Thus it is already established that a response with similar temporal and topographic parameters as attack in animals is produced by reduction of both primary and secondary reinforcer type agents in man. Naturally much additional work needs to be accomplished.

EXTRACT FROM PROJECT SUMMARY: ENVIRONMENTAL CAUSES OF AGGRESSION, BY RONALD R. HUTCHINSON, DEFENDANTS' TRIAL EXHIBIT 72, U.S. DIST. CT., W.D. OF WISC.

* * *

This grant will continue support of a project previously supported by grant GB-18413 to Western Michigan University. Environmental determinants of aggression will be studied using adult males of three mammalian species as subjects. In a number of experiments, squirrel monkeys in restraining chairs will be exposed to electric shock (punishment or noncontingent: constant, randomized, or gradually increasing intensity; with or without prior administration of various doses of alcohol, caffeine, meprobamate, salieylic acid, or dextrose) or to progressively more difficult auditory or visual discriminations. Pressure transducers will be used to measure the intensity of the monkeys' biting attack on a hose; the relationship between bite force and attack probability, frequency, and duration will be studied. Electromyographic recording will also be attempted, for comparison with data from humans. Jaw-clenching and related reactions elicited by isolating human subjects for 30 to 90 minutes will be measured by electromyographic and electrocardiographic recording.

* * *

EXTRACT FROM EFFECTS OF NICOTINE ON AVOIDANCE, CONDITIONED SUPPRESSION AND AGGRESSION RESPONSE MEASURES IN ANIMALS AND MAN, RONALD R. HUTCHINSON AND GRACE S. EMLEY, PUBLISHED IN DUNN (ED), *SMOKING BEHAVIOR: MOTIVES AND INCENTIVES*, WASHINGTON, D.C., V. H. WINSTON, 1973, DEFENDANTS' TRIAL EXHIBIT 71, U.S. DIST. CT., W.D. OF WISC.

INTRODUCTION

It is the position of this discussion that tobacco usage involves a powerful chemical reinforcement process and that the chemical reinforcer is nicotine. We come to this conclusion because the experiments that we have conducted demonstrate that for both animals and man the administration of minute doses of nicotine (*a*) produces rapid and pronounced decreases in the effects of stressful and unpleasant stimulation through the reduction of the reflex behavioral processes normally generated thereby, while (*b*) simultaneously enhancing reactions which allow the reduction or termination of such stressors. There is widespread agreement that a reduction in the impact of aversive events constitutes powerful reinforcement for the behaviors producing such reduction, and similarly, that the behaviors producing such reduction, and similarly, that the behaviors producing enhancement of responses which lead to escape from or avoidance of aversive events are powerfully reinforced by such response enhancement. These ideas will be discussed in greater detail in later sections of this chapter.

LETTER FROM JAMES TEEGARDEN TO RONALD R. HUTCHINSON, APRIL 25, 1974, DEFENDANTS' TRIAL EXHIBIT 91, U.S. DIST. CT., W.D. OF WISC.

Ronald R. Hutchinson, Ph.D.
Director of Research
Research Department
Kalamazoo State Hospital
Kalamazoo, Michigan 49001

Dear Dr. Hutchinson:

Dr. Pawlowski has asked me to respond to your request for information stemming from the recent review of the application entitled, "Analysis of Noxious Stimulus Produced Alcohol Intake" (1 RO1 AA01271-01). That information is contained in the following remarks.

Reviewers agreed that this proposal is devoid of procedural details and rationale such that it is extremely difficult to evaluate. For example, although proper control conditions for several of the studies are alluded to, the sketchy description of the procedure sections show no inclusion of control subjects. Furthermore, virtually no temporal dimension of the studies are specified. The bulk of the proposal contains studies which are preliminary, and could have been done earlier, especially since you have done many similar studies using other drugs. Thus, the basic paradigm should already be well established, and reviewers did not think it reasonable to request additional support for this aspect of the research. Only the last two studies were thought to have possible merit, but their presentation lacks sufficient rationale for what were considered to be weakly presented predictions. Finally, even if the proposal were stronger, it should be clear that the questions of primary interest pertain to the effects

of noxious stimulation on behavior, and, only secondarily to the causes and effects of alcohol ingestion.

We hope this information proves useful to you and that you will let us know if you require additional information.

Sincerely yours,

/s/ James C. Teegarden
James C. Teegarden, Ph.D.
Executive Secretary

EXTRACT FROM NEWSPAPER ARTICLE, "LOOKING FOR ANSWERS: KALAMAZOO STATE HOSPITAL RESEARCHERS INVESTIGATE BEHAVIOR", KALAMAZOO GAZETTE, DECEMBER 8, 1974, DEFENDANTS' TRIAL EXHIBIT 55, U.S. DIST. CT., W.D. OF WISC.

Monkey business is serious business to 15 scientists and technicians at the Kalamazoo State Hospital research department.

That's because Dr. Ronald R. Hutchinson, director of the research department, and his staff know that there's more to a monkey's emotional makeup than monkeying around all the time.

Hutchinson, known affectionately to his staff as "Hutch", oversees a unique laboratory housed in the Burns building at KSH in which researchers are probing the causes of emotions with the help of some 100 South American squirrel monkeys.

* * *

Hutchinson, formerly a member of the Western Michigan University psychology faculty, became a parttime behavioral research and treatment consultant for the Ft. Custer State Home in 1968.

His research expanded and government interest grew in his work. In 1972, however, the state announced it was closing the Ft. Custer State Home. So the state Department of Mental Health transferred Hutchinson's lab to some available space at KSH and provided some seed money to expand Hutchinson's staff and help him in what had become a full-time devotion.

The move gave Hutchinson a chance to combine his doctoral background in experimental psychology from Yale with his somewhat incongruous training as an engineer at the General Motors Institute in Flint.

Psychological testing requires a lot of expensive equipment. But money is hard to get for such programs. So Hutchinson decided to put his engineering abilities to work modifying government surplus material to suit his project's needs.

"Ninety per cent of the equipment in this building—two, three, maybe four million dollars' worth—is bent, broken or otherwise useless federal property." Hutchinson says, with a proud glint in his eye not unlike that of a successful salesman. "We're running on other people's castoffs."

The facility builds and renovates much of its equipment in its own machine and carpentry shops, and electronics engineer Edward Hallin develops electronic systems for the experiments using government hand-me-downs.

"I'm really just a high-paid beggar," laughs Hutchinson from behind his large government-surplus desk as his voice echoes slightly through his carpetless office.

EXTRACT FROM FINAL REPORT TO NASA FOR FEBRUARY 1, 1974 TO JANUARY 31, 1975: MEASUREMENT AND FACILITATION OF COOPERATIVE TASK PERFORMANCE, RONALD R. HUTCHINSON, DEFENDANTS' TRIAL EXHIBIT 68, U.S. DIST. CT., W.D. OF WISC.

* * *

A substantial series of experiments has now been completed documenting the validity and reliability of the jaw clench measure as it relates to the measure of anger and stress contact.

Experiments have been completed showing that the onset of loud noise produces consistent jaw clenching and other correlated negative affect motor behaviors. Similarly, the termination of a positive reinforcer, i.e. consumption of cigarettes, also produces jaw clenching. Further studies showed that termination of secondary positive reinforcers, such as the delivery of coins or termination of tertiary positive reinforcers, such as interruptions of counts on a counter, also led to immediate increases in jaw clenching.

Three series of experiments have been done to determine under what conditions jaw clenching will occur.

1) Experiments involving a high fixed-ratio response requirement have shown that jaw clenching in humans occurs in an analogous fashion to the biting produced with similar increases in fixed-ratio schedules in infrahuman subjects.

2) Experiments involving reduction in the amounts of money received for particular tasks or simple reduction in delivery of money independent of any work cause increases in the jaw clench response and other negative affect motor behaviors.

3) Experiments have demonstrated that perception of more favorable conditions existing for another person can actually increase anger and hostility, even though no actual reductions in reinforcement occur for the subject under study.

The results from these experiments presented in the attached figures provide good validation that the measures of jaw clenching are a valid index of anger and hostility and correlate well with other overt actions such as cursing, hitting the machine testing apparatus, etc. Data collected also indicate that this jaw clench measure is suitable for the determination of disruption in social cooperative performances in small groups.

REPORT TO OFFICE OF NAVAL RESEARCH OF DR. MORTON A. BERTIN, COORDINATOR FOR PSYCHOLOGICAL SCIENCES, RE: HUTCHINSON RESEARCH, PLAINTIFF'S TRIAL EXHIBIT 24, U.S. DIST. CT., W.D. OF WISC.

DATE: January 28, 1975

Name(s) and Title(s) of Person(s) Contacted

Dr. Ronald R. Hutchinson
Director Research Department

Summary of Discussion

Dr. Ronald Hutchinson, Principal Investigator, traced the methods that have been developed for the simultaneous assay of three basic and separate motor processes in several species, including monkeys and man. They have also extended the pharmacologic assay of these processes in the squirrel monkey and have extended and further confirmed the methods for mea-

surement of these reactions in non-social and social environments in humans.

The laboratory has developed a broad base of information on the effects of a variety of clinically or self-prescribed compounds on emotional reactions in the squirrel monkey. They have recently begun to discover the biochemical and humoral complex of actions on these same emotional reactions. Several compounds known to have direct effects on the adrenergic system have been studied including propranolol - beta adrenergic blocker, and phentolamine - alpha adrenergic blocker. Also under study is the cholinergic system (arecoline-nicotinic actions; mecamylamine-nicotinic blocker; atrophine and scopolamine-muscarinic blockers). Hopefully this information will lead to an understanding of the biochemistry of emotional reactions produced by stress exposure.

It has been found that the masseter (jaw) muscle contraction and other bodily movements in human subjects during loud noise and frustrating environmental conditions bear the same temporal and intensive relationships as do the lever-pressing and hose-biting responses in the squirrel monkey. Extensions of the early experiments determining the conditions under which jaw clenching would occur have further validated the measure as an indicator of anger and hostility. Experiments involving reduction in the amounts of money received for a particular task or simple reduction in delivery of money independent of any work cause increases in jaw clench and other negative affect behavior. It has also been shown that perception of more favorable treatment of another person can increase anger and hostility though no reduction of reinforcement occurs to the subject per-

sonally. These studies provide added indications of the correlation of jaw clenching as an emotional measure when compared with more overt actions. Thus the research in the past year has made progress towards unraveling the biochemistry of emotional responses and has further validated the jaw clench measure as an index of anger and hostility in humans.

EXTRACT FROM SENATE HEARINGS, COMMITTEE ON APPROPRIATIONS, FISCAL YEAR 1976, H.R. 8070, PART I, DEFENDANTS' TRIAL EXHIBIT 17, U.S. DIST. CT., W.D. OF WISC.

Page 1

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BUDGET REQUEST

Senator Proxmire. The subcommittee will come to order.

The Senate Appropriations Subcommittee on HUD-Independent Agencies is meeting this morning to receive testimony from the National Science Foundation on its fiscal year 1976 budget request.

Dr. Stever, I welcome you and your colleagues. It is good to see you again.

* * *

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Senator Proxmire, I had the Library of Congress put together a printout of the private foundation investment in the social sciences. In 10 months of 1974, private foundations poured over $53 million into social

science research. This does not include grants under $15,000, and it does not include awards for demonstrations or experimental psychology or sustained support. So the figure could have gone much higher.

This massive private investment in the social sciences gives further indication that perhaps the National Science Foundation should consider an even less extensive investment. I know you only invest 5 or 10 percent of your budget in this discipline—maybe it should be less. Again, I must question the values of your studies, such as "Hitchhiking, a Viable Addition to a Multimodal Transportation System"; that cost $15,000. "Preliminary Investigation of Special Impact of Television on Blacks," $121,000—this subject of the impact of TV has been studied to death.

"Social Behavior of Alaskan Brown Bears"; that cost $27,600 in fiscal year 1974, $81,000 overall. "Comparative Histology of Primate Teeth"; that cost $17,200 this year with an overall grant of $25,000. "The African Climate During the Last Ice Age"—cost $112,000.

HITCHHIKING

Could you give us a brief synopsis of these five projects and what they hope to accomplish? I am particularly interested in the hitchhiking proposal. What will that do to benefit the Wisconsin dairy farmer or the Indiana factory worker?

* * *

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TITLE TO RESEARCH EQUIPMENT

Senator Proxmire. Public Law 85-934, among other things, gives Federal basic research agencies authority to vest title in institutions of higher learning or nonprofit organizations for the equipment purchased under grants or contracts. It also requires these agencies to report annually to Congress on the number of grants and value of these grants to institutions in which title to equipment was vested.

Now, considering the National Science Foundation's support of this legislation—which you did, I understand—including the annual report requirement, why does the Foundation not prepare a report setting forth the specific grants involving the transfer of title to equipment? Perhaps your General Counsel, Mr. Brown, can give us the legal citations as to why Public Law 85-934 does not apply to NSF.

Mr. Brown. The basic act of the National Science Foundation from the very beginning has contained authority to make grants; both of money and property. From the very beginning, we have also—

Senator Proxmire. Will you give us a citation for the record? You do not have to give it to me now, but for the record, so that we have it.

Mr. Brown. It is section 11(e) of the Science Foundation Act. 42 United States Code 1870. With your permission I would like to insert this section in the record.

* * *

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ROYALTIES ON INVENTIONS

Sentor Proxmire. Is it not true now that, under the present contract, MIT gets a substantial share of the benefits, and the inventor

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gets a minority share but gets some share? I would think you could work out something that would pay for the program so that the taxpayer could get his money back.

Dr. Eggers. Well, sir, I believe I can argue that—

Senator Proxmire. MIT gets 65 percent of the benefit, the student gets 35 percent. The Government, that puts up all the money, gets nothing. Zero.

Dr. Eggers. Well, this certainly, I am sure, will deserve examination over the long haul. But right now, we are confronted in this country, as you well know, with growth of new industries to provide employment. This activity is stimulating in an incipient way, but a growing fashion, the growth of new industries to employ people. And that, in turn, gives the American taxpayer money, because these people are not on welfare.

Senator Proxmire. Well, I think you can get an argument from any economist on that basis. There is no way to provide jobs by new inventions unless you also have a way of enabling people to buy the product invented.

Dr. Eggers. Well, yes, sir, but these products are being bought.

Senator Proxmire. Well, you have got to provide the financing. Money has to come from somewhere.

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Dr. Stever. Mr. Chairman, the NSF funds are scheduled to decrease as revenues from industry go up in this program. This was a seeding operation and is not something we are going to sustain over a period of time. If that kind of innovation really does get started in places likes MIT, I personally think we have done something quite good for the country.

Senator Proxmire. Why do you not ask MIT to pay back its grant out of the profit it makes?

Dr. Stever. Pay back the grant? I do not know whether that is legal.

Mr. Brown. The grant has been made for a program. We have the right to terminate it if the growth does not—

Senator Proxmire. I am not talking about whether it takes a change in the law. Perhaps it is a new idea, but it seems to me it is an idea which is sensible for something of this kind. Here you do have an unusual kind of a grant. It is not a grant to enable a student to get an education, which is something quite different. This is a grant where there is a profit payoff, in many cases, which enriches the institution greatly and enriches the inventor. I do not complain so much about the inventor. Of course you have to have an incentive for him, and I do not think it is wrong for the institution to get something. But it seems to me that the people who put up all the money also ought to get a return, and that is the taxpayer.

Dr. Stever. Mr. Chairman, in Britain and in France, I am told that in fact your idea is used in the counterpart of RANN there. I do think it would take a change in the law for NSF to operate that way.

Senator Proxmire. From what line item in your budget is this project being supported, Dr. Stever?

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NSF AUDIT FUNCTION

Senator Proxmire. I am very interested in the performance of your internal audit unit. Before I get to that, I would like to followup a response you made yesterday in an attempt to get the additional information for the record.

Did you indicate that the Department of Health, Education, and Welfare was doing some audit work for you?

Dr. Stever. The Department of HEW does the onsite audit for almost all grants awarded by the National Science Foundation. We do have an internal audit office, but it does not do that kind of work.

Senator Proxmire. I understand that your auditing office issued its first program-type audit on your Division of Computer Research on February 18, just a few days ago.

Dr. Stever. Yes, sir.

Senator Proxmire. Can you give us a brief account of the results of that audit and provide more detail for the record?

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Dr. Stever. Mr. Taylor, can you do that?

Mr. Taylor. Yes. This particular audit, Mr. Chairman, looked at a number of grants awarded by the Foundation's Office of Computing Activities. The report found that most of the grants audited achieved the objective set forth in the grant application. I will provide a more detailed summary of the findings for the record.

* * *

REMARKS OF CONGRESSMAN BAUMAN, CONGRESSIONAL RECORD, VOLUME 121, APRIL 9, 1975, H 2602, DEFENDANTS' TRIAL EXHIBIT 98, U.S. DIST. CT., W.D. OF WISC.

* * *

It is time Congress questioned all the research projects which the National Science Foundation supports. Just how appropriate is it for the taxpayer to support such activity in a time of recession, a time when many workers are seeking jobs, and many of those who have jobs are juggling their budgets to make their paychecks cover living costs which have been escalated by inflation? Regardless of how important a scientific project may be within a community of specialists how comfortable can we feel asking ordinary wage earners to support researchers paid at an average annual rate of up to $45,000.

Another problem area within the National Science Foundation, which requires further study before we approve this authorization, is the extent to which NSF's

activities overlap and duplicate projects being carried on by other agencies of Government.

* * *

This sort of thing is not only potentially duplicative, but it encourages the practice of grant shopping. Anybody who looks at the academic community with any objectivity can tell you that things have changed on campus. You would not find many Mr. Chips there any more. Of increasing importance to educational institutions these days are not good teachers and scholars, but those who are adept in the fine art of grantsmanship—getting Government and foundation money for chic research projects. The theory among professional grantshoppers is that, once you have mastered the subleties of proposal-writing, if you cannot get money from one agency of Government, you can find it in another corner of our Federal leviathan.

* * *

We cannot avoid this issue. We cannot possibly avoid this issue because our constituents are watching us. They are fed up with all the Federal spending for these insane and questionable purposes. There are people out of work and this Government is facing a $100 billion deficit.

MEMORANDUM BY FRED STOLLNITZ RE: CONTACT WITH MORTON SCHWARTZ, APRIL 14, 1975, PLAINTIFF'S TRIAL EXHIBIT 15, U.S. DIST CT., W.D. OF WISC.

UNITED STATES GOVERNMENT

MEMORANDUM

Date: April 14, 1975

TO: Congressional Liaison Office, GPP

VIA: Deputy Assistant Director for Research

VIA: Division Director, BMS

FROM: Associate Program Director for Psychobiology, EMS

SUBJECT: Conversation with Morton Schwartz of Senator Proxmire's staff

Mr. Schwartz phoned me this morning with questions and comments about Ronald R. Hutchinson (Kalamazoo State Hospital). He said Senator Proxmire was going to attack support of Hutchinson's research by several Federal agencies which had amounted to about half a million dollars since 1967 and had produced very little but laughably obvious conclusions.

Schwartz explained that he was calling because he respected MSF's technical expertise; his own background, he said was in academic economics with some work in psychology, and his closest friend had done considerable psychology. Later in the conversation he said he had asked someone in the academic world, in the area of animal behavior, about Hutchinson. His information told him that Hutchinson had been going along for years doing mediocre but sound work.

Schwartz also said he had checked with most of the major research supporting agencies; he wondered if we knew that Hutchinson had applied eight times to NIMH and had been turned down every time. I said I didn't know how many applications he had submitted, but I did know that his applications fared badly at NIMH. Schwartz said that NSF has a reputation for supporting only the highest quality research; he wondered why we were supporting work that other agencies would not support. I said that each agency had its own interests, and I did not think that agencies could be rank-ordered along a single continuum of quality. The people I talk with at NIMH say that when their funds are tight they can support only projects bearing on child mental health or on schizophrenia, which are priority areas for NIMH. I also explained that NSF's reviewers saw Hutchinson's chief contribution as being a systematic introduction of quantitative measurement techniques into a research area that badly needed such an objective approach, rather than a contribution of major conceptual break throughs. Schwartz said that quantification to him as a social scientist is a little different from quantification to an engineer (Hutchinson's initial field), and Schwartz thinks the quantification that Hutchinson is doing is without value—it doesn't matter if people clench their jaws hard or only slightly when they get angry.

Schwartz asked if we knew that Hutchinson had received continued ONR support concurrently with NSF's most recent grant (GB-33620X). Schwartz was looking at Hutchinson's letter of December 1971, which said that ONR would not give further support. I referred him to the program staff's memoranda to the file, in March 1972, noting that ONR would support Hutchinson's research and describing a detailed comparison of the two projects to

assure that there was no overlap. I pointed out that the amount we had granted was less than half of the $120,000 that Hutchinson had requested for the three years. Schwartz said he hadn't seen the requested budget, although he did have a copy of the proposal. Schwartz expressed surprise that NSG was supporting work that seemed to him to approach preclinical drug screening. I said that the rationale for the work was quite different; that by finding classes of drugs that had similar behavioral effects, Hutchinson hoped to gain some insight into the neurochemical mechanisms underlying aggression. Schwartz said he had seen that statement in the memorandum about Hutchinson's 1973 office visit. He noted that Hutchinson had more recently obtained support from the National Institute on Drug Abuse for work with some additional drugs.

Schwartz said he was most concerned not about the work that NSF had supported but about the work with human subjects supported by NASA and ONR. (He also noted that NSF supported a little of the work with human subjects, and I think he was equally unhappy about that.) He had seen a couple of master's theses from Western Michigan University that acknowledged Hutchinson's support from several agencies. One of the theses, he said, had found that people clench their jaws when they exhibit other forms of aggressive behaviors, such as kicking the experimental apparatus. Another, he said, had found that people in a gaming situation clenched their jaws when they found out that it wasn't a fair game. He didn't think that NASA had to pay $50,000 to find out that people on a space mission who played cards would get angry if they were cheated in the game.

The actual sequence of the conversation was quite different—and less coherent—from that given above.

Schwartz called back later in the morning to ask about Hutchinson's new proposal (BMS 75-1 499). I gave him the information he asked for; amount requested ($114,723 for three years), title ("The Environmental Causes of and Pharmacologic Influence Upon Aggression and Drinking"), and list of other research support (NASA grant; pending proposals at ONR, NIDA, and NIH).

Fred Stollnitz

MEMORANDUM BY FRED STOLLNITZ RE: CONTACT WITH MORTON SCHWARTZ, APRIL 15, 1975, PLAINTIFF'S TRIAL EXHIBIT 16, U.S. DIST. CT., W.D. OF WISC.

United States Government

MEMORANDUM Date: April 15, 1975

TO: Congressional Liaison Office, GPP

VIA: Deputy Assistant Director for Research

VIA: Division Director, BMS

FROM: Associate Program Director for Psychobiology, BMS

SUBJECT: Conversation with Morton Schwarts of Senator Proxmire's Staff

Mr. Schwartz phoned again this morning to make sure he had the facts correct about NSF's first grant to support Ronald R. Hutchinson's work (GB-5580 to Western Michigan University). Specifically, he wanted to know if that grant had been to study environmental causes of aggression or if it had been for work using brain-lesion techniques. I told him that the title was "Environmental and Physiological Causes of Aggression"; he seemed satisfied

with that information. He reviewed his list of NSF grants for Hutchinson's work; I mentioned the supplement to GB-5980, which he had omitted, and he said, "$4,700 isn't worth fighting about." I said I was sorry he thought the rest of it was worth fighting about.

Mr. Schwartz said that Federal support for Hutchinson's research was going to be the "Golden Fleece of the Month." Senator Proxmire doesn't think much of any of the work, and in particular thinks that 1/4 million dollars from NASA and ONR didn't extend the NSF research very far. If the main objection was to support from those agencies, I asked, why tar everyone with the same brush? Schwartz said that the NSF contribution was "peculiar". Hutchinson found that he could make monkeys alcoholic by shocking them, but it's been known "since the ancient days of psychiatry" that shock therapy makes people very thirsty. I said that researchers in the area of alcoholism had been searching for years for an animal model, and that if Hutchinson had come up with a reliable technique for making animals alcoholic it was a real contribution.

Mr. Schwartz said that Senator Proxmire was not particularly upset by Hutchinson as an individual, but he was upset by the grantsmanship that Hutchinson exemplified. Schwartz drew the analogy with a policeman who picks up someone driving 70 mph even though someone else may be doing 75, just because that's when the radar happened to be on. Hutchinson was "running around to different agencies merchandising an innovation," as if he were saying he had made a discovery that only he could divulge and the agencies would have to pay him plenty for it. I pointed out that Hutchinson had no patent on his techniques and had published them in the open literature; anyone else who wanted to use the techniques and apply for support from the Federal agencies was free to

do so. Mr. Schwartz agreed but likened the situation to a defense contractor who had already done related work and thus was in a favorable position in competing for future contracts. I wondered if there really was an objection to the free enterprise system operating in science; I pointed out that Senator Proxmire was concerned that the results of NSF research be applied to national problems, and here was a researcher who not only did the basic work but was willing to apply it in areas of concern to several Federal agencies. Mr. Schwartz said that the other agencies justification for supporting the work was weak. He had a statement from NASA, which he said could probably have been prepared better if they had taken more time to do it, and a statement from ONR (Don Woodward) was on the way. I pointed out that it was difficult for people in the agencies to prepare adequate statements when they felt they had to respond so quickly to requests from Senator Proxmire's office. Mr. Schwartz recognized that they operated on a "crisis" basis, but he said it was possible for an agency to come up with a strong enough justification to avert a challenge. He mentioned that people on Senator Proxmire's staff had once been ready to attack NIHM for putting so much money into Daniel Lehrman's research on reproductive behavior of ring doves, but NIHM had come up with a strong justification and Schwartz had made his own assessment that the work was "just below Nobel-prize level" and it would be a mistake to attack it. I said that Lehrman was well-known and it was therefore relatively easy to see that his work was of high caliber, but suppose the same work had been done by a little-known researcher?

Mr. Schwartz said that one's perception of the world depends on the role one is playing. I had come from a university and was not at NSF. He had come from a university and was now on Senator Proxmire's staff. He said, "Perhaps if I were still sitting in a university I'd be upset with Senator Proxmire, but I'm playing a different role here." He apparently does not share what he called the Senator's unfortunate personal biases against the social sciences, which the Senator considers pseudoscience equivalent to alchemy. Schwartz said he has tried to talk to the Senator about that, saying that the work must continue if we're to find out whether it's alchemy or not. But he said that Proxmire considers mathematical work in political science particularly laughable and he recalls that economists made tremendous errors last year, some of which embarrassed Proxmire after he had talked with economists. According to Schwartz, the Senator is asking whether certain aspects of science must go forward with public funding in a time of tight budgets, and there's general agreement among the staff (including Schwartz) that some fields of science will have to battle with others for support. However, he said, Senator Proxmire realizes how tight the NSF budget is, and he's not about to call for a 10% cut, or anything like that.

Fred Stollnitz

OFFICE OF NAVAL RESEARCH RESPONSE TO GOLDEN FLEECE AWARD, APRIL 15, 1975, PLAINTIFF'S TRIAL EXHIBIT 23, U.S. DIST. CT., W.D. OF WISC.

DEPARTMENT OF NAVY
Office of Naval Research
Arlington, Virginia

From: Chief of Naval Research

To: Chief of Information

Subj: Criticism by Senator Proxmire of ONR Contract with Kalamazoo State Hospital

Ref: (a) Advanced copy of press release scheduled to be issued on 18 April

Encl: (1) Statement by ONR in response to subject criticism

1. Reference (a) names the Office of Naval Research, along with the National Science Foundation (NSF) and the National Aeronautics and Space Administration (NASA), as Senator Proxmire's "choice for the Golden Fleece Award for the biggest waste of taxpayers' money for the month of April." He makes this statement in reference to a contract that the Office of Naval Research has had with Kalamazoo State Hospital, Kalamazoo, Michigan, and specifically refers to the principal investigator, Dr. Ronald R. Hutchinson. NSF and NASA have also supported Dr. Hutchinson's work. Enclosure (1) is forwarded as requested by the Chief of Information as a proposed response to press queries resulting from the Proxmire release.

2. It is understood that NSF and NASA are also preparing material to be used in response to press queries.

There has been some informal coordination with those agencies in handling this matter.

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There are many Navy situations in which personnel in small groups must interact closely for relatively long periods of times while on board ship or patrol aircraft. A major problem in these situations can be inappropriate aggressive behavior that is counterproductive to the efficient operation of the ships or aircraft as well as harmful to individuals. The Navy is concerned with discovering how human aggressive behavior develops and is maintained and also with learning techniques for possibly reducing such behavior when it may be disruptive and potentially dangerous.

A research program with these objectives has been supported by the Office of Naval Research through a contract with Kalamazoo State Hospital. Dr. Ronald R. Hutchinson is the principal investigator. It should be noted that none of the funds provided by this contract, which ended last December, went directly to Dr. Hutchinson. These funds were paid to the Kalamazoo State Hospital, which used the funds to pay for laboratory overhead, purchase equipment and material for the experiments, provide for animal care, to pay research assistants, and a portion of Dr. Hutchinson's salary.

The research program involved experiments with both animals and humans. One discovery of this research pro-

gram has been that once an individual due to outside pressures or stimulants reaches an aggressive level of behavior, he will remain aggressive long after those pressures or stimulants are absent. Biting and jaw clenching are considered reliable and accurate indications of aggressive behavior. Another finding is the effect that pharmaceutical agents, particularly tranquilizers and stimulants, have on aggressive behavior. It was learned that certain tranquilizers increase general motor activity while decreasing aggression whereas stimulants, such as amphetamines, increase both types of behavior initially but then decrease both types as more are taken. Such information has provided the Navy with clues on handling actual or anticipated unruly and potentially harmful aggressive behavior.

The research supported by the Office of Naval Research did not duplicate the work funded by the National Science Foundation (NSF) and the National Aeronautics and Space Administration (NASA). Dr. Hutchinson with his NSF funds concentrated on the biochemical and physiological elements of aggressive behavior and with his NASA money focused on the degree to which aggressive behavior is indicated by biting and jaw clenching.

REMARKS OF SENATOR PROXMIRE, CONGRESSIONAL RECORD, VOLUME 121, APRIL 18, 1975, S6220, DEFENDANTS' TRIAL EXHIBIT 4, U.S. DIST. CT., W.D. OF WISC.

THE GOLDEN FLEECE AWARD

Mr. Proxmire. Mr. President, my choice for the "Golden Fleece" Award for the biggest waste of taxpayers' money for the month of April goes jointly to the National

Science Foundation, National Aeronautics and Space Administration and the Office of Naval Research for spending almost $500,000 in the last 7 years to determine under what conditions rats, monkeys, and humans bite and clench their jaws. From the findings of these studies it is clear that the Government paid a half million dollars to find out that anger, stopping smoking and loud noises produce jaw clenching in people.

I might say this is the second in a series of "Fleece of the Month" Awards which will climax in a "Biggest Waste of the Year" Award.

All this money was given to Dr. Ronald R. Hutchinson of Kalamazoo State Hospital in Michigan. Last year alone the good doctor spent over more than $800,000 of which more than $100,000 were Federal funds. And what are some of the other results reached by these research projects in the last 7 years?

Dr. Hutchinson told NASA that people get angry when they feel cheated and tend to clench their jaws or even scream and kick. NSF learned that Dr. Hutchinson's monkeys became angry when they were shocked and would try to get away from the shock. In addition, NSF was informed that drunk monkeys do not usually react as quickly or as often as sober monkeys and that hungry monkeys get angry more quickly than well-fed monkeys.

The Office of Naval Research appears to have gotten the same type of so-called research as did the NSF and NASA.

It is very interesting to trace the history of these extremely similar and perhaps duplicative projects. In 1967, NSF gave Dr. Hutchinson $44,700 to study environmental and physiological causes of aggression. For 2 years

Dr. Hutchinson studied the biting reactions of monkeys when they received electric shocks. He also compared their reaction while being given a number different drugs such as alcohol and caffeine. In 1969, the NSF gave Dr. Hutchinson another $26,300 to continue these experiments. He received another grant, this one for $51,200 in 1970 from the NSF.

By this time Dr. Hutchinson was ready to extend his work to human biting and jaw clenching. In 1970, Dr. Hutchinson received a grant which ran for 5 years from the ONR to continue research on subhuman primates to determine the environmental, physiological, and biochemical factors responsible for the maintenance of aggressive behavior and systematic replication of results obtained in primates extended to human subjects. Total funding from the Navy ran to $207,000.

During this period, Dr. Hutchinson applied for and received a $50,000 grant from NASA to develop measurements of latent anger or aggression in humans by means of jaw clenching. In addition, Dr. Hutchinson received his fourth NSF grant in 1972 for $51,800 in order to continue his experiments on monkeys and extend the work to human jaw clenching.

Dr. Hutchinson who in addition to being research director at Kalamazoo State Hospital, is also an adjunct professor at Western Michigan University and president of his own nonprofit Foundation for Behavior Research, has proposals presently pending before the NSF, the National Institute of Drug Abuse, and the National Institute of Mental Health to continue research on monkeys' drinking, drug and jaw-clenching habits. If Dr. Hutchinson is successful in this new grantsmanship attempt, he would receive an additional $150,000 of taxpayer's money.

The funding of this nonsense makes me almost angry enough to scream and kick or even clench my jaw. It seems to me it is outrageous.

Dr. Hutchinson's studies should make the taxpayers as well as his monkeys grind their teeth. In fact, the good doctor has made a fortune from his monkeys and in the process made a monkey out of the American taxpayer.

It is time for the Federal Government to get out of this "monkey business". In view of the transparent worthlessness of Hutchinson's study of jaw-grinding and biting by angry or hard-drinking monkeys, it is time we put a stop to the bite Hutchinson and the bureaucrats who fund him have been taking of the taxpayer.

RONALD R. HUTCHINSON'S REPLY TO GOLDEN FLEECE AWARD, APRIL 18, 1975, DEFENDANTS' TRIAL EXHIBIT 63, U.S. DIST. CT., W.D. OF WISC.

Aggression and violence are major social problems. Every citizen knows the serious results of violent crime, vandalism, riots, and other forms of interpersonal hostility. Many billions of dollars are spent each year by government agencies, law enforcement groups, and insurance companies because of these acts. Of even greater importance are the countless human tragedies and sufferings which occur. Sometimes these acts are the result of serious hardships or stressful conditions in a person's immediate environment, at other times no current reason for such behavior is apparent.

The work of the research program at the Kalamazoo State Hospital has resulted in development of some of

the most precise and accurate methods now available for the study of aggression in several animal species. Experiments have clarified how several general types of environmental stress are capable of provoking anger and aggression. Using these methods it has been discovered that certain drugs are selectively capable of reducing such reactions. Other drugs often medically used for this purpose have been found to be far less selective in their effect. Further research has discovered how some "drugs of abuse" increase while others decrease tendencies toward violent aggression. As this work has progressed over the years it has become possible to develop an objective and reliable method for the laboratory measurement of anger in normal human volunteers.

As the understanding of the causes of anger, aggression, and violent antisocial acts has become more clear the possibility of improved treatment for individuals and corrective action for their environments comes closer to reality.

Four Federal agencies have reviewed this work. These reviews are conducted at the time of grant application and yearly thereafter. Each funding application is subjected to review by scientists from both inside and outside of the agencies who are experts in the field. Each agency is always fully informed of other support which the researcher is currently provided or which is under review. Funding by these agencies is tailored to support specific projects for which no other support is provided.

Senator Proxmire berates and ridicules these agencies and their "bureaucrats" for the support of this research and the process by which the support was provided. He further evaluates the work as "transparent worthless" research. By disrupting the orderly process of governance,

by belittling the reviews of the scientific funding agencies, and by public, uninformed, and inexpert discredit of work which is so socially necessary, he causes a disservice to his constituents and to the country.

NEWSPAPER ARTICLE, KALAMAZOO GAZETTE, APRIL 18, 1975, RE: RONALD R. HUTCHINSON'S REPLY TO GOLDEN FLEECE AWARD, PLAINTIFF'S TRIAL EXHIBIT 32, U.S. DIST. CT., W.D. OF WISC.

He Gets Sen. Proxmire 'Fleece Award'

KALAMAZOO SCIENTIST DEFENDS HIS MONKEY AGGRESSION STUDY

By ROBERT LEWIS AND JAMES SHAMP, Gazette Staff Writers

Sen. William Proxmire, D - Wis., today called federally funded studies on aggression at the Kalamazoo State Hospital Research Department "transparent worthlessness," while scientists at KSH defended them as "socially necessary."

Proxmire, a frequent critic of Pentagon waste, recently has turned his guns on federal support of basic scientific research with public releases of "Fleece of the Month Awards."

Other recent "award - winners" have included a University of Minnesota study of why people fall in love and a Michigan State University investigation of the sexual activity of some college women.

Dr. Ronald R. Hutchinson, KSH research director, says his experiments with monkeys and other animals are pro-

viding necessary groundwork for a better understanding of human aggression and improved treatment of hostility.

The research program at KSH has received more than one-third of its support from the State Department of Mental Health.

But the Proxmire lambast resulted from some $431,000 in grants during the past seven years from the Office of Naval Research, the National Science Foundation and the National Aeronautics and Space Administration.

State funding for Hutchinson's research was withdrawn in January, and, according to the medical superintendent of KSH, Dr. William Decker, the research department will be "terminated" as of July 1.

"The only relationship between Dr. Hutchinson and KSH is that we made available an empty building on our grounds," said Dr. Decker today. "We also provided some accounting services for him.

"But last fall, the Department of Mental Health asked that every state institution re-evaluate its programs. When we did that, our conclusion was that our primary consideration should be the direct care to the patients. So we did recommend to the department that this program be terminated," Dr. Decker said.

He said the Burns Building in which the research project is located would probably be used to house a local substance abuse program—now housed in a KSH building slated for demolition.

Dr. Decker did not say if Hutchinson's research was dropped for other than economic reasons, and said that Hutchinson is "seeking to affiliate himself with other sponsors" to keep the research project going.

"To be fair to Dr. Hutchinson, you'd have to look at the whole project—what its goals and objectives are, and its intent related to the problems of the human individual," Dr. Decker said of the Proxmire statement.

Proxmire said in his statement today that the Hutchinson research studies, which have included measurements of such reactions as jaw clenching in monkeys to log aggressive reactions, "makes me almost angry enough to scream and kick and even clench my jaw."

"It's time for the federal government to get out of this 'monkey business,' " said Proximire. "In view of the apparent worthlessness of Hutchinson's study of jaw-grinding and biting by angry or hard-drinking monkeys, it's time we put a stop to the bite Hutchinson and the bureaucrats who fund him have been taking out of the taxpayer."

The KSH research has included studies into the relationship of stress to drug abuse, alcoholism and other "self-destructive" behavior, and has shown that monkeys which are generally not interested in booze will drink alcohol in the face of an electrical shock stimulus.

A front-page feature story outlining the work at the KSH Research Department appeared in The Gazette last Dec. 8.

Hutchinson, who holds a Ph.D. in experimental psychology from Yale and formerly was on the Western Michigan University faculty, started his research part-time at the Fort Custer State Home in 1968.

When the Fort Custer facility was closed in 1972, the state Department of Mental Health moved Hutchinson's lab to KSH and provided seed money to hire staff and make it a full-time research facility.

After developing what Hutchinson described as "some of the most precise and accurate methods" available to measure anger in monkeys and other animals, Hutchinson says his experiments have helped show how such things as environmental stress provokes aggression.

"Using these methods it has been discovered that certain drugs are selectively capable of reducing such reactions," Hutchinson said.

Hutchinson said part of his work has been aimed at getting away from treating aggression with large doses of tranquilizers, which has a "general sedating effect."

"Tests like ours are the only way to assess therapeutic doses at low and intermediate levels, possibly leading to development of new compounds that will be more selective in their effects upon limited, specific emotions."

"Even in general medical practice, there was a time when diagnostic screening was done on the basis of interviews and observations. Now lab tests can tell doctors infinitely more.

"We have to use similar methods for psychological screening. As it is now, much diagnosing and prescribing is done by psychologists and psychiatrists on the basis of interviews and observations," said Hutchinson.

"But when you don't go through the process of full discovery and scientific review, it really throws the whole thing up for grabs."

Hutchinson said that even though Proxmire's blast "poses a very major threat to our continued funding, I'm really not unhappy with the ostensible goals of the senator.

"Waste and corruption in government certainly is a problem and needs monitoring. But by using the public

media like this, he states the issues oversimply, doesn't provide for give and take through a committee process, and he leaves an agency defenseless if it wants to deal in good faith."

But Hutchinson added, in response to Proxmire's statement, that "by disrupting the orderly process of governance, by belittling the reviews of the scientific funding agencies, and by public, uninformed and inexpert discredit of work which is so socially necessary, he causes a disservice to his constituents and the country."

Hutchinson said he has received calls of support from several funding agencies, and said that the agencies which have reviewed his work have been berated and ridiculed by Proxmire.

A National Science Foundation spokesman defended the Hutchinson research, noting the high cost in human lives and property from wars and crime which produce a need for better understanding of aggressive behavior.

MEMORANDUM BY FRED STOLLNITZ RE: CONTACT WITH MORTON SCHWARTZ, APRIL 21, 1975, PLAINTIFF'S TRIAL EXHIBIT 17, U.S. DIST. CT., W.D. OF WISC.

United States Government

MEMORANDUM Dated: April 21, 1975

TO: Congressional Liaison Office, GPP

VIA: Deputy Assistant Director for Research

VIA: Division Director, BMS

FROM: Associate Program Director for Psychobiology, BMS

SUBJECT: More Problems with Hutchinson Raised by Morton Schwartz of Senator Proxmire's Staff

Mr. Schwartz phoned this afternoon, saying that he had "additional information, some of which is evidence and some of which is speculation," about Ronald R. Hutchinson of Kalamazoo State Hospital. The two points that concerned him were a patent issued to Hutchinson for use of nicotine in treating aggression or anger, and alleged mismanagement of Federal funds by Hutchinson.

After Senator Proxmire's press release about Hutchinson appeared, a patent attorney told Schwartz about a patent that he (the lawyer) had set aside for use as a joke with his patent-lawyer friends. When one of these friends smoked a cigarette, the lawyer would tell him he was breaking a patent, and would pull out Hutchinson's patent for use of nicotine. The lawyer told Schwartz that the patent was worthless and would be broken easily if it were worthwhile for anyone to do so. But Schwartz

was interested in the fact that the patent had been assigned to Hutchinson's Foundation for Behavioral Research, and not to any of the Federal agencies that had supported Hutchinson's research. Schwartz said that was, at best, questionable, since the patent application cited as documentation a paper that acknowledged partial support from ONR, NASA, NSF, the Michigan Department of Mental Health, Western Michigan University, and Philip Morris, U.S.A. Schwartz speculated that Hutchinson might defend himself by claiming that a non-Federal agency had supported the research directly (illegible) leading? to the invention. I said that, to the best of my knowledge, Hutchinson had not notified NSF of any invention. I recognized that he had reported his research findings on the effects of nicotine, and Schwartz mentioned that the paper cited in the patent application had been sent to NSF with a letter to Dr. Sasert dated January 27, 1972. (The paper, entitled "Effects of Nicotine on Avoidance Conditioned Suppression and Aggression Response Measures in Animals and Man," by Hutchinson and Grace S. Emley, has since been published as a chapter in a book entitled *Smoking Behavior: Motives and Incentives*, edited by W. L. Dunn and published in 1973 by V. H. Winston of Washington, D. C.)

Schwartz also said he had learned that the termination of Hutchinson's position at Kalamazoo State Hospital was not the result of lack of research funds in the Michigan Department of Mental Health (the reason that Hutchinson had given me on January 27, 1975), but because Hutchinson had allegedly mismanaged research funds. Schwartz said he wanted to "handle this very properly for Hutchinson," and asked if I knew of anything that would confirm or deny his information. I said that a memo to the same effect had been circulated at NSF last Friday, but as

far as I knew these were merely allegations. Schwartz said he understood that the FBI and Michigan Attorney General's investigations alleged that there was intent involved, and tried to get criminal charges brought, but there was insufficient evidence. Nevertheless, he wondered what steps NSF was taking in checking, auditing, or otherwise following up. I said that our Grants Officer knew of the investigations and that, considering the involvement of the FBI, there did not seem to be anything else we should do at the moment. Mr. Schwartz said he was concerned that the same proposal that Hutchinson had just submitted to us had also been submitted to NIMH, and that NIMH might make an award without knowing of the situation. He asked if I would feel obligated to tell them what I knew. I said I would not tell them about allegations, but that if Hutchinson were convicted of something I would tell them that if I learned that they were going to make an award; however, I said that even if there were a conviction I was not sure what the implication should be for future awards. Schwartz suggested that it should have no hearing on the decision about whether or not to fund a scientifically meritorious project, but that it would call for doubly cautious monitoring and auditing of the use of the funds. He asked if we had learned of the problem only late last week; I said that one of the Federal audit agencies had notified NSF of the investigation some time ago, within the last year.

Schwartz said he was going to draft a letter for Senator Proxmire to send, without publicity, to the heads of the several Federal agencies that had supported Hutchinson's research, asking what information the agency had about the two points we had discussed and what the agency had done to follow up. He saw this case as related to

the general point that Senator Proxmire had made about the monitoring. I asked if he knew how many projects each NSF program officer was responsible for; he did, and was aware of differences between AD/R and AD/RA in this regard. I pointed out that as the funding situation for research had gotten tighter in other agencies, NSF had been swamped with proposals, and without a proportionate increase in staff, program officers had inevitably given priority to reviewing proposals, rather than to post-award monitoring except through review of renewal proposals, in order to assure that Federal funds were being awarded for only the most meritorious projects. Schwartz said he considered NSF's "front-end" review excellent, but "on-going review is a weak spot." I asked if he and the Senator were pressing for increased staff for NSF so that we could better carry out that responsibility. He said that if the Director made a strong case for more staff to improve research management, he would probably get a sympathetic hearing. Schwartz said he had attended only parts of the NSF hearings (his responsibility is to investigate Labor and HEW), but his impression was that Dr. Stever was not making an urgent case for more staff but was instead pleading for more money to support research. Schwartz said the case for increased staff would have to be well documented in terms of workload, or else it would sound like "any other Federal bureaucrat asking for more staff."

Schwartz said he had spent only a week investigating Hutchinson and he came up with several indications that something peculiar was going on. I asked what the indications were, so that we might be more alert for future problems. He said he was surprised that Hutchinson had been vice president of one research group and had then founded his own organization. He had called Michigan State (I assume he meant Western Michigan Univer-

sity) and learned that Hutchinson had worked out complicated deals for the use of personnel and facilities, with large monetary values. (I assume this was while Hutchinson had grants at Western Michigan and was conducting research at Fort Custer State Home, where he was Research Director). Schwartz was also suspicious of what seemed to be duplicative funding from several agencies, and he menticned the patent (which he learned about only after the press release, as I understand it). Schwartz also said he had received communications from former colleagues of Hutchinson (it was not clear to me whether these came before or after the press release), who had charged that Hutchinson had put his own name on work done by others—a review paper in the Nebraska Symposium on Motivation had been specifically mentioned. Schwartz noted that this might be just normal academic backbiting by disgruntled individuals, and he mentioned one former colleague who said that Hutchinson was bright, had done some fine work, and was "playing the same game we all do," but was playing it in a way that seemed to the former colleague to go beyond the bounds of propriety, with Hutchinson giving no regard to anything but the outcome (positions, salary, grants, prestige). I said that the peer review system is our best safeguard against such improprieties, because reviewers who are actively working in the same research area will blow the whistle if they see an applicant trying to take credit for others' work. (I did not say that they are less likely to blow the whistle if the applicant is taking credit for work done by others in the applicant's laboratory. On the other hand, it could be argued that an individual who organizes and directs a productive laboratory should be the one who is designated Principal Investigator on research grants that support the work of the laboratory.)

Fred Stollnitz

EXTRACT FROM AUDIT REPORT OF THE RESEARCH DEPARTMENT OF KALAMAZOO STATE HOSPITAL, DEPARTMENT OF MENTAL HEALTH, SEPTEMBER 15, 1968 THROUGH AUGUST 20, 1974, DEFENDANTS' TRIAL EXHIBIT 106, U.S. DIST. CT., W.D. OF WISC.

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Management Control Exercised Over Research Department

The research department was phased in as a mental health program after it was transferred from the psychology department of Western Michigan University to the Fort Custer State Home in August 1968. In July 1972, the central office of the Department of Mental Health directed that, because the Fort Custer State Home had been discontinued as a mental health facility, the research department be relocated in the Burns Building at Kalamazoo State Hospital. Since its inception, the research department's mental health related goals or objectives were not clearly delineated; this made it difficult to evaluate program performance or to determine the relationship or priority of the research endeavor to Michigan's mental health system. To best exemplify the aforementioned conditions, we present the following quote from a self-evaluation report issued in October 1974 by the research department:

> ". . . The purpose of the research program and the ultimate standard by which it must be judged is development of the knowledge necessary to improve Mental Health Treatment Programs. In this context it must be noted that no known benefits

have yet resulted from Research Department efforts."

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The research department conducts research funded by two federal grants and one federal contract in addition to State funding. For fiscal year 1972-73, the Legislature authorized $273,200 for research activities. The authorization included $75,000 appropriated from the State general fund and $198,200 to be obtained from federal grants. These grants were for research for the Office of Naval Research, the National Science Foundation, and the National Aeronautics and Space Administration.

Appropriations for the 1973-74 fiscal year made $214,500 available for research, with $87,600 provided from the State general fund and $126,900 from federal grants. During our audit period, five full-time employees were paid from the funds appropriated from the State general fund. Federal grant and contract funds were utilized to pay the salaries of approximately an additional seven full-time equated employees.

During the course of our audit of Kalamazoo State Hospital, the recently appointed administration voiced concern and requested an audit of the management and administration of the research department. From discussions with current and past management personnel of both Kalamazoo State Hospital and Fort Custer State Home, it became clear that, at least in the minds of the medical superintendents, the research department was established by the Department of Mental Health and functioned primarily as a part of the central office. Previous directors of the Department of

Mental Health seemed to have assumed line authority and responsibility for the research department activities, irrespective of the research function being appropriated as a hospital activity. The respective hospital management generally functioned in the capacity of providing administrative services only. The "hands off" policy mandated to the local hospital administration, and the lack of on-site supervision by the central office, resulted in the director of the research department developing his program and functioning as an autonomous entity.

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A review of research department operations indicated that the research director operated autonomously and with almost complete disregard for management practices.

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c. The hospital administration constantly informed the research director that he was overspending the allotments in his research grants. In one instance, his reply to the business office was that the business office had instituted "illegal accounting practices" and he continued to spend funds. In order to cover the overspending, grant funds for the next fiscal year were reallocated to the current year.

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e. Although the State equipment policy prohibits the use of State-owned equipment for personal needs, the research director established a laboratory policy enabling employees to take equipment home for personal use.

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(c) Although the research grants were awarded to the respective State hospitals by the respective federal agencies, the research director, being the principal investigator only, requisitioned large quantities of federal excess equipment and supplies without prior approval of the hospital administration.

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(e) The research director reportedly requested permission of the Fort Custer State Home administration to obtain a grant from Philip Morris to study the effects of nicotine on aggression. At that time, the hospital administration apparently indicated no desire to involve the Department of Mental Health in this type of research. The research director proceeded to accept the Philip Morris grant as an officer of the Behavior Development Corporation. This private nonprofit corporation was used as a means through which the money was channeled for grant expenditures. The actual research was conducted in the laboratory at Fort Custer State Home. No control over the revenue, expenses or activities for the grant was exercised by the hospital administration.

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(h) The research director without approval or knowledge of mental health management personnel initiated various means of generating departmental revenues. Revenues from a variety of sources

were commingled in a maze of checking and savings accounts in the name of the research department, with supporting accounting books and records maintained in a haphazard manner.

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In violation of State and federal statutes and rules and regulations specifically relating to the disposition of State and federal excess and surplus property, the research director sold public-owned equipment, supplies and material. The research director established a practice of holding closed auctions and pre-priced sales which were attended only by research department staff, friends and associates of the research director. In those instances when no in-house sale could be consummated, a research department employee was designated to locate and consummate a sale to a private firm or individual. Some research department personnel referred to the items sold as junk, whereas others along with several private firms stated the items purchased were either in personal or family use and in some instances resold at a profit. Statements were also received that, on at least one occasion, research department employees accompanied the research director on a visit to the State-federal surplus property warehouse in Lansing to acquire items for their personal use. The service fee charged upon requisition of the items was charged against State funds whereas the sales revenue was deposited in the research department accounts.

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(1) Three squirrel monkeys were sold to Ohio State University and two to the National Institute of Health for $15.00 each (while at Kalamazoo State Hospital—KSH).

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As previously indicated, costs incurred which may be attributed to these [Philip Morris] grant awards were minimal in relationship to the amount received, and the State of Michigan received no indirect or overhead cost reimbursement. Subsequent to the completion of both projects, it was evident that a sizable unencumbered cash balance had been created. In March 1972, the research director and several of his staff formed and became officers of a nonprofit corporation entitled "Foundation for Behavioral Research." The research director informed us that he was advised that this would be a good way to avoid paying taxes on the profits derived. A review of the records disclosed that the research director transferred assets of $23,226.06 to the Foundation for Behavioral Research account. Of this amount, $3,000 was immediately transferred back to the research department account. Considering that all monies held by the research department had been commingled and with no legal restraints on expenditures, we were unable to ascertain how the research director was able to determine which portion of the balance would be transferred to the foundation account.

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5. *Investment of Excess Funds Held by the Research Department*

As has been previously stated, all receipts of the research department, irrespective of the source, were commingled in the various accounts maintained by the research department. Further, with the exception of the tentative budgets presented as a part of the Philip Morris grant documents, no restrictions or restraints were placed on the use of these funds. For this reason, it is not possible to formally identify which receipts by source were used for which expenditure purpose, or to identify the equity balance by source.

The research director, faced with a sizable cash balance, stated that he decided on three methods to invest the excess funds. The methods were to deposit monies in interest bearing savings accounts, to make loans or advances to research department employees and associates, and to invest in the stock market. Following is a summary of these investment activities:

a. *Savings Accounts*

During the period May 19, 1971 to July 17, 1973, three savings accounts were utilized for varying periods of time. The accumulative principal deposited totaled $14,500 and the interest earned amounted to $276.29.

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b. *Loans and Advances to Research Department Employees and Associates*

Thirty-two loans and advances totaling $43,279.76 were made since the inception of this practice in August 1969. Although several loans were non-interest bearing, interest income amounted to $3,252.48. Loans in the amount of $24,779.76 have been repaid, including a repayment in the amount of $500 which was received for services rendered by an employee. Loans to the research director in the amount of $18,500, which were secured by a second mortgage, were outstanding as of August 1974. The loan receivable asset was transferred to the Foundation for Behavioral Research on May 1, 1974.

It was also noted in comparing loan repayment records to deposits in the accounts of the research department that payments totaling $321.10 could not be identified as deposited.

c. *Stock Transaction*

Our review of the books and records of the research department indicated that the stock of fourteen companies was bought and sold during the period April 30, 1971 to February 15, 1973. The net gain on these transactions amounted to $2,818.15.

Upon noting that the stock transactions were made in the individual names of research department employees, we inquired as to the intent. The research director stated that this was necessary because the research department did

not have a federal identification number necessary for tax purposes. He further stated that any taxes resulting from these stock transactions would have been paid on the individual tax returns. We were unable to locate any reimbursements to the employees for taxes paid on behalf of the research department. Further, one employee stated that she did not recall paying taxes on the stock transactions in her name.

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The research director contends that the stock transactions were made in behalf of the nonprofit corporation, although as previously stated the nonprofit corporation was not established until March 1972. Further, all monies were received and disbursed from the research department accounts which consisted of commingled monies from a variety of sources. Concerned that the nonprofit corporation would show a profit, the research director stated that in early 1973 the Foundation for Behavioral Research awarded $3,000 to the research department to present a retreat-seminar in Nassau. As has been previously stated, the initial corporate officers of the foundation were all research department employees. In order to make the $3,000 award, $3,000 was withdrawn from the research department accounts, deposited in the foundation account, and a check drawn on the foundation account to the research department account. The entire transaction took place on February 28, 1973.

Administrative leave for the Nassau trip was requested and authorized by the medical super-

intendent for fourteen department employees, covering the period April 28, 1973 through May 6, 1973. The salary costs for those employees authorized to attend amounted to $2,646.00. Subsequent discussion with the medical superintendent indicated that the approval was based on the facts as presented at the time. The research director had informed him that the research department had been awarded funds by a private foundation to cover the expenses of attending a scientific retreat-seminar. The superintendent stated that he was not advised that the foundation was comprised of research department employees, nor that research department employees and their families would be the only persons present.

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In our attempt to categorize and identify expenditures, we were required to rely on statements of expenses provided us by the research director, scraps of paper, verbal information provided by the research staff, and various supporting documents. In summary, it should be stated that we cannot attest to the complete accuracy of the categories of expenditures because of inadequate documentation.

We present the following ten categories of expenditures, some of which appear to be questionable as relating to either research endeavors or State operated programs. These categories do not include expenditures relating to activities previously discussed in prior sections of this report:

Lighthouse Expense	$6,278.45
Travel Expense	$6,408.12
Flying Club Payments	$1,305.61
Student Mileage and Tuition	$ 408.92

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Gifts and Bonuses to State and Retired Federal Employees and Other Individuals	$1,871.60
Human Subject Expense	$1,960.00
Labor	$9,951.79
Entertainment Expense	$ 862.42
Miscellaneous Expense	$2,292.97
Unidentifiable Purpose	$1,473.26

Pertaining to these expenditures, we present the following descriptive data:

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b. *Travel Expense*

These expenses were incurred for research staff trips to acquire surplus properties, to attend conventions and for various other trips. Some examples and reasons for these trips are illustrated below:

Present the Findings of a Philip Morris Research Project (partially reimbursed)	$ 508.66
Retreat-Seminar Held in Nassau for Research Department Employees	$3,000.00
Attendance at Nine Conventions by the Research Director and Staff	$2,249.67*
Acquisition of Surplus Properties	$ 178.66

*Includes payment to Western Michigan University of $501.21 for the research director's attendance at two conventions. These costs were initially charged to university accounts, but were subsequently denied by the university because grant funds were exhausted.

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e. *Gifts and Bonuses to State and Retired Federal Employees and Other Individuals*

The documentation provided us for these expenditures indicated that gifts were given to federal employees upon their retirement, a separating research department employee, the research director's father, and to members of the Fort Custer State Home administration when closing the facility. Gifts and Christmas bonuses were also given to the research department staff.

The following data illustrates some of the expenditures from the research department accounts:

Cash Bonuses Given to Research Staff	$ 1,145.00
Gifts of Alcoholic Beverages	$ 71.64
Gifts to Two Retired Federal Employees	$ 145.50
Gifts to Three Members of Fort Custer State Home Administration	$ 167.73

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Gifts to an Employee Discontinuing Research Employment	$ 29.12
Pipes for an Acquaintance and the Father of the Research Director for Services Provided	$ 15.00

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i. *Miscellaneous Expense*

This category includes a wide variety of expenditures from the research department accounts. We present the following examples of some of the expenditures derived from the records available to us:

Research Director's Consulting Psychologist Certification Fees	$ 75.00
Purchases of Materials Relating to Stock Investments	$313.45
American Psychological Association Dues	$ 33.00
Flight Training Manuals	$ 54.88
Subscription to Coin World	$ 6.00
Research Director's Parking Violation	$ 12.00
Internal Revenue Service Bulletins	$ 4.00
Research Staff Notary Fee	$ 22.70
Research Staff Dentist Bill	$ 8.00
Newspaper Advertisements to Sell Equipment and to Employ Warehouse Help	$ 21.85

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j. *Unidentifiable Purpose*

Neither the research department staff nor the books and records maintained indicated the purpose for which $1,473.26 was spent. A review of the canceled checks, however, indicated that some of the checks were made payable to:

The Research Director	$154.79
The Research Department Staff	$377.28
Other Individuals	$571.53

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NEWSPAPER ARTICLE, GRAND RAPIDS PRESS, RE: AUDIT OF KALAMAZOO STATE HOSPITAL RESEARCH DEPARTMENT, MAY 9, 1975, DEFENDANTS' TRIAL EXHIBIT 104, U.S. DIST. CT., W.D. OF WISC.

AUDIT ADDS LEGAL HEAT TO MONKEY STRESS RESEARCH

LANSING — Three state agencies are intensifying investigations into the multimillion-dollar activities of a "monkey research" unit at Kalamazoo State Hospital following an auditor general's report.

National attention had been focused on the unit recently for spending more than $400,000 in federal and state funds for a study of stress in monkeys.

But Auditor General Albert Lees' report Thursday said there are serious questions involving the use of literally thousands of items of federal and state "surplus" equipment ranging from nuts and bolts to computers and an airplane.

Also being investigated are the practices of a purportedly nonprofit foundation formed by the research director and his employes which, among other things, invested in the stock market with public funds, and paid for a trip to the Bahamas for staff aides.

State agencies carrying out the investigations are the Attorney General's Office, the State Police and Department of Treasury.

At the heart of the controversy is Dr. Ronald Hutchinson, a Yale-educated experimental psychologist and engineer whose $25,000-a-year state job as director of the

Research Department at Kalamazoo State Hospital is being eliminated.

Hutchinson has declined comment on the audit report, saying he was asked by Dr. William Decker, hospital superintendent, not to talk at this time.

Decker, in turn, said that the research department's work will be ended June 30 because he and Department of Mental Health officials decided there was little, if any, benefit for the hospital's primary aim of treating emotionally ill patients.

In 1972-73, the Legislature authorized $273,200 for the research unit's activities, including $75,000 in state funds, and $198,200 to be obtained from federal sources. For 1974-75, $214,500 was authorized, including $87,600 from the state and $126,900 from federal agencies.

It's possible that some of the most recently allocated funds may not be spent or may be recovered before the project is ended June 30, officials said.

Dr. Donald C. Smith, acting director of the Department of Mental Health, said a new research project-review procedure is now tentatively in effect which would put any future such proposals through an exhaustive consideration process.

State Sen. John A. Welborn, D-Kalamazoo, said he was "shocked, dismayed, and frustrated beyond belief of what has been allowed to happen with state and federal tax dollars," in the case.

However, Welborn said the blame for "this total lack of management and deliberate defiance of proper fiscal control" belongs on the previous administration of the Department of Mental Health, rather than on the present officials of the hospital or state department.

It was the former state director, Dr. E. Gordon Yudashkin, who ordered a "hands-off" policy of independent operation for the research unit, Welborn said.

The auditor general's report gave these general categories of problems:

"Inadequate accounting for funds independently administered by the Research Department"; "public funds improperly administered by the Research Department"; "use of public facilities and equipment for the conduct of unauthorized programs"; "unauthorized use of personal residence as work station, and performing unauthorized duties during scheduled working hours"; "entering into unauthorized use permits and agreements with the Department of Natural Resources" (for use of two lighthouses); and "unauthorized capital outlay projects."

Dr. Hutchinson, also billed the federal government for flying club payments for himself for $1,305.61, the auditor's report said.

The federal surplus property included a Cessna airplane, a radio transmitting set, a generator mounted on a trailer, seven U.S. Navy flight jackets, 17 sleeping bags, 40 blankets and a ping pong table, the audit said.

"He apparently decided to take flying lessons in case the airplane was made airworthy," Decker said.

The Research Department originally was operated by Western Michigan University's department of psychology. It later was transferred to Ft. Custer State Home in August of 1968. When the state home was phased out as a mental health facility in 1972, the project was transferred to the Burns Building at Kalamazoo State Hospital.

The two lighthouses acquired by Hutchinson for the stated purpose of use as "research conference centers and

for retreats" were the Sturgeon Point Lighthouse at Harrisville State Park and Big Sable Lighthouse at Ludington State Park.

Both were acquired through use permits given by the Department of Natural Resources. The state owns the Harrisville lighthouse, but the DNR itself has access to the Ludington lighthouse by a use permit by the U.S. Coast Guard.

The Harrisville lighthouse was vacated by the Research Department after extensive remodeling before the state audit, but Hutchinson has continued to try to retain the Big Sable lighthouse, the auditors said.

An extensive section of the audit deals with the use and disposal of millions of dollars of surplus federal equipment. The audit report said that more than $1 million worth of equipment and supplies was obtained free over six years from the federal government by the Research Department.

Hutchinson himself said in an interview last month that he had obtained equipment worth anywhere from $2 million to $4 million.

Most of the equipment was junked or second hand and would have been disposed of by the federal government anyway, he said.

"I'm really just a high-paid begger," Hutchinson said in the interview then.

The auditors, however, said that "in violation of state and federal statutes and rules and regulations," Hutchinson sold public-owned equipment, supplies and material.

"The research director established a policy," the audit said, "of holding closed auctions and pre-priced sales which

were attended only by research department staff, friends and associates of the research director."

The receipts of the sales, the auditors said, were processed as private funds of the research department with no reimbursements to the state.

Among the items sold by Hutchinson, the auditors said, were:

—Three squirrel monkeys, which cost up to $140 each originally, were sold to Ohio State University and two to the National Institute of Health for $15 each;—A floor jack was sold for $1 to a research department employee who said he in turn sold it to a friend for $50;

—Gold was sold on four occasions for a total of $517.54. The gold was obtained by "cannibalization" of electronic components and gold welding rods acquired through federal government excess property;

("Correspondence relating to one sale indicated that the gold was represented as having been inherited by the research director and a research department employe," the audit said.)

. . . A riding lawn mower obtained at Ft. Custer State Home was reconditioned and sold by Hutchinson through a newspaper advertisement for $175.

"The conduct of autonomous one-man operations of this nature," the auditors said, "especially where records and controls are minimal at the best, can have a serious impact on the public trust, confidence and credibility of public officials."

NEWSPAPER ARTICLE, DETROIT FREE PRESS, RE: AUDIT OF KALAMAZOO STATE HOSPITAL RESEARCH DEPARTMENT, MAY 9, 1975, DEFENDANTS' TRIAL EXHIBIT 59, U.S. D.C., WESTERN DIST. OF WISC.

STRANGE EXPENSES AT HOSPITAL GET RESEARCHER FIRED

LANSING —(AP)— State auditors report thousands of dollars in unusual expenses for research at Kalamazoo State Hospital.

Dr. William Decker, hospital director, said Thursday that the head of the research department has been fired, effective June 30, and 13 other employes also will be let go when the research department is phased out on that date.

DR. RONALD Hutchinson, a psychologist and head of the research department at the mental health hospital, billed the federal government $8,278.45 for a lighthouse in Ludington and $1,305.61 for flying club payments for himself, the report by state Auditor General Albert Lee said.

Because his department was funded primarily through federal grants, Hutchinson was able to acquire at no cost federal surplus property that was unrelated to his research, Lee and Decker said.

The surplus property included a Cessna airplane, a radio transmitting set, a generator mounted on a trailer, seven U.S. Navy flight jackets, 17 sleeping bags, 40 blankets and a ping pong table, the audit said.

Acquired "for personal use by the research staff" were a rifle scope, a sun compass, a gas generator, an oscillograph and four blasting machines, the audit said.

Hutchinson's department got $126,000 in federal funds in 1974.

When the auditors were unable to find a ping pong table, two picnic tables, two refrigerators and an air conditioner which were supposed to be at the state hospital, they were told that, except for the air conditioner, the items were at the lighthouse.

"He (Hutchinson) said the lighthouse could be used for seminars," Decker said.

Hutchinson was not immediately available for comment.

NEWSPAPER ARTICLE, DETROIT NEWS, RE: AUDIT OF KALAMAZOO STATE HOSPITAL RESEARCH DEPARTMENT, MAY 9, 1975, DEFENDANTS' TRIAL EXHIBIT 57, U.S. D.C., WESTERN DIST. OF WISC.

BARGAIN DAYS COST STATE RESEARCHER HIS JOB

The head of a research program at Kalamazoo State Hospital has been fired for his alleged involvement in a number of illegal actions which included selling melted-down, federal surplus gold welding rods as heirloom gold.

The researcher, Dr. Ronald Hutchinson, will be out of a job June 30, according to hospital director Dr. William Decker, because of the "mess he created." Grants supporting Hutchinson's work will run out at that time.

Disclosure of Hutchinson's activities came from an investigation of the hospital's Research Department by State Aud. Gen. Albert Lee.

Lee's investigation found Hutchinson also held closed auctions and pre-priced sales for friends, and co-workers at which a variety of equipment belonging to the state or federal government was sold at less than even bargain basement prices.

Hutchinson, according to the audit report sold a floor jack to a co-worker for $1. The co-worker in turn resold it to a "friend" for $50.00.

Also sold were wrenches, to a private surplus store; a riding lawn mower, a hair dryer, a 16 mm projector system for $50, a picnic table and air conditioner for $32, a drill press for $25 and three tents for $10 total.

The audit said Hutchinson "had no authority to sell public-owned equipment, supplies and materials or to keep the money as departmental funds."

"The conduct of autonomous, one-man operations of this nature, especially where records and controls are minimal at best, can have a serious impact on the public trust," the auditor general said.

The auditors also found that Hutchinson took a personal loan of $7860 from a special grant he received from the Phillip Morris Co. for research he was doing with monkeys. Only $128 of more than $40,000 in grant money was used for research, the audit showed.

Hutchinson, according to the audit, used some of the money - $222 for personal membership in a flying club - some more for buying stock in 14 companies in the names of research department employees, $2,600 for a department trip to Nassau in 1973, where only 14 of the 25 traveling on the money were from the department.

Flying club dues totaling $922 and plane charter fees costing $383 for Hutchinson were paid from money other than his own, the audit says.

Research department accounts also show that $1500 was spent for gifts and cash bonuses to the research staff and Hutchinson's father and alcoholic beverages.

NEWSPAPER ARTICLE, KALAMAZOO GAZETTE, RE: AUDIT OF KALAMAZOO STATE HOSPITAL RESEARCH DEPARTMENT, MAY 9, 1975, DEFENDANTS' TRIAL EXHIBIT 58, U.S. D.C., WESTERN DIST. OF WISC.

THE 'MONKEY' PROBE

Three State Agencies Looking Into KSH Research Project Case

LANSING — Three state agencies are intensifying investigations into the multimillion-dollar activities of the "monkey research" unit at Kalamazoo State Hospital following an auditor general's report.

National attention had been focused on the unit recently for spending more than $400,000 in federal and state funds for a study of stress in monkeys.

But Auditor General Albert Lee's report Thursday said there are serious questions involving the questionable use of literally thousands of items of federal and state "surplus" equipment ranging from nuts and bolts to computers and an airplane.

Another major issue being probed is practices of a purportedly nonprofit foundation formed by the research director and his employes which, among other things, invested in the stock market with public funds, and paid for a trip to the Bahamas for staff aides.

State agencies carrying out the investigations are the Attorney General's Office, the State Police and Department of Treasury.

At heart of the controversy is Dr. Ronald Hutchinson, a Yale-educated experimental psychologist and engineer who is director of the Research Department at Kalamazoo State Hospital.

Hutchinson has declined comment on the audit report, saying he was asked by Dr. William Decker, hospital superintendent, not to talk at this time.

Decker, in turn, said that the research department's work will be ended June 30 because he and Department of Mental Health officials decided there was little, if any, benefit for the hospital's primary aim of treating emotionally ill patients.

In 1972-73, the legislature authorized $273,200 for the research unit's activities, including $75,000 in state funds and $198,200 to be obtained from federal sources. For 1974-75, $214,500 was authorized, including $87,600 from the state and $126,900 from federal agencies.

It's possible that some of the most recently allocated funds may not be spent or may be recovered before the project is ended June 30, officials said.

Dr. Donald C. Smith, acting director of the Department of Mental Health, said a new research project-review procedure is now tentatively in effect which would put any future such proposals through an exhaustive consideration process.

The auditor general's report gave these general categories of problems:

"Inadequate accounting for funds independently administered by the Research Department"; "public funds improperly administered by the Research Department"; "use of public facilities and equipment for the conduct of unauthorized programs"; "unauthorized use of personal

residence as work station, and performing unauthorized duties during scheduled working hours"; "entering into unauthorized use permits and agreements with the Department of Natural Resources" (for use of two lighthouses); and "unauthorized capital outlay projects."

The Research Department originally was operated by Western Michigan University's department of psychology. It later was transferred to Fort Custer State Home in August of 1968. When the state home was phased out as a mental health facility in 1972, the project was transferred to the Burns Building at Kalamazoo State Hospital.

An extensive section of the audit deals with the use and disposal of millions of dollars of surplus federal equipment. The audit report said that more than $1 million worth of equipment and supplies was obtained free over six years from the federal government by the Research Department.

Hutchinson himself said in an interview last month that he had obtained equipment worth anywhere from $2 million to $4 million.

Most of the equipment was junked or second hand and would have been disposed of by the federal government anyway, he said.

"I'm really just a high paid begger," Hutchinson said in the interview then.

The auditors, however, said that "in violation of state and federal statutes and rules and regulations," Hutchinson sold public-owned equipment, supplies and material.

"The research director established a policy," the audit said, "of holding closed auctions and prepriced sales which were attended only by research department staff, friends and associates of the research director."

The receipts of the sales, the auditors said, were processed as private funds of the research department with no reimbursements to the state.

NEWSPAPER ARTICLE, "AUDIT CALLED UNFAIR, BIASED", KALAMAZOO GAZETTE, MAY 10, 1975, DEFENDANTS' TRIAL EXHIBIT 60, U.S. D.C., WESTERN DIST. OF WISC.

KSH Researcher Responds To Allegations

AUDIT CALLED "UNFAIR, BIASED"

By James Shamp
Gazette Staff Writer

The director of the Kalamazoo State Hospital Research Department says a state audit released this week alleging irregularities at the research facility was "unfair and biased."

Dr. Ronald R. Hutchinson said the wide-ranging audit report fails to differentiate between uses of public and private money by the research department.

Hutchinson said there are some "very strange omissions" in the audit report released to the public Thursday by the office of state Auditor General Albert Lee.

"In my opinion the auditor general's report is a collection of half truths, untruths and unsubstantiated opinions," Hutchinson said today.

"By the repetitious statements of inaccuracies and opinions, and the systematic failure to report all relevant facts, the document represents a malicious and potentially damaging statement.

"Recently I have read in several newspapers that I took federal grant funds and speculated in the stock market, that I billed the federal government for thousands of dollars for a lighthouse, that I spent government money for flying club payments and finally that I have been fired.

"Each of these reports is totally untrue. An optimist would take heart and know that fairy tales really do exist."

The researcher admitted, however, that "I stupidly deposited receipts from the sales of government surplus scrap into interest-bearing bank accounts."

"Even though we eventually used at least twice that amount to renovate public buildings, I would have been better off simply dropping that money on some state official's desk, or never having salvaged and sold that scrap."

The scrap Hutchinson referred to was listed in the audit report as more than $1 million in government surplus equipment and supplies, obtained free by the research department over a period of some six years.

Hutchinson said that the surplus material, most of which was declared worthless by the U.S. Department of the Navy and turned over to the state, was sold by members of the research department staff when representatives of the state surplus salvage depot in Lansing deemed the scrap valueless.

He said proceeds of the sales were then used to renovate an unused state building for a laboratory.

Hutchinson explained that the research department originated as a private project while Hutchinson was a full-time member of the Western Michigan University psychology faculty.

Because of a need for more space as Hutchinson's research expanded, he said, it was moved to the Fort

Custer State Home in 1968. But it wasn't until the project was moved to the Kalamazoo State Hospital Burns Building in 1972, when the Fort Custer State Home was closed, that the research project received public funding, Hutchinson said.

Up to that time, Hutchinson had been working on a study of the effects of nicotine on aggressive behavior, funded by the Philip Morris Co., and operated as a private research project, the researcher said.

"There's a great deal of self-serving in this audit report," said Hutchinson. "What the auditor general has done is give a public description of private affairs."

Hutchinson said that the private money entered the audit report even though Hutchinson had "an explicit promise from the auditors that the only reason they wanted to look into our private funds was to see that the records we presented to them as receipts from dispersal of public materials were accurate."

"What nobody can understand is that the whole program has never had a dollar from the state for supplies, materials or contractual services. So we renovated old buildings and surplus goods to keep the project alive," said Hutchinson.

He said the audit report implied many irregularities at the research department when they were actually procedural technicalities he wasn't aware of "because my background is that of a college professor" rather than a state bureaucrat.

"I got a fast, hard education from this audit," said Hutchinson. For example, he said, the nature of his job required that he work irregular hours. He said he had "an understanding" with his superiors at the Kalamazoo

State Hospital that he could perform tasks such as writing research findings and grant requests at his residence. "Even as the auditors were working in our department, I was doing some of my work at home. I had no idea that was going to become an 'irregularity' in the auditor's report. If I'd known that, I'd have been there (at his state hospital office) every morning, very conspicuous," he said.

He added that he understood the research department had the blessing of its superiors to use two abandoned lighthouses for conferences and seminars, but that after the audit he was told to leave the lighthouses.

There were several major changes in the administration of both the Kalamazoo State Hospital and the state Department of Mental Health since the research department moved to the state hospital in 1972, and Hutchinson indicated that those changes affected unwritten policies and methods of operating the research facility.

NEWSPAPER ARTICLE, "RESEARCHER TO VACATE KALAMAZOO STATE HOSPITAL?", KALAMAZOO GAZETTE, MAY 11, 1975, DEFENDANTS' TRIAL EXHIBIT 61, U.S. D.C., WESTERN DIST. OF WISC.

Scientists at the Kalamazoo State Hospital Research Department are making tentative arrangements to move their research project to other quarters in the Kalamazoo area.

According to Dr. Ronald R. Hutchinson, director of the KSH project embroiled in controversy since it was lampooned as a waste of taxpayer's money by U.S. Sen.

William Proxmire, D-Wis., tentative arrangements are being made to move the research facility to the Augusta area.

After Proxmire issued a proclamation giving the research department his "Golden Fleece of the Month Award" recently, the office of State Auditor General Albert Lee released a public report alleging irregularities in the handling of money, personnel and property under Hutchinson's control.

Hutchinson, who says he earns "just over $30,000 a year" as head of a 10-member staff investigating the causes of anger and aggression and the effects of drugs on those emotions, was quoted in The Gazette Saturday saying the audit was "A collection of half truths, untruths and unsubstantiated opinions."

Hutchinson is at loggerheads with the auditors on many points brought up in the 64-page audit report released Thursday in Lansing, but he has admitted to having "stupidly" invested some private money and implied that he followed some improper procedures.

Part of the gray area in the handling of money stems from deposits of private and public funds in a single checking account, the researchers said.

Hutchinson and a colleague had formed a private research organization to administer a grant of some $40,000 from the Phillip Morris Co. for the study of the effects of nicotine on aggression.

Hutchinson said we "negotiated with them (Phillip Morris) on a flat contract price, based on what we determined it would cost to perform the work. We did not want a profit—but we came up with residual contract funds as a result of completion of the contract.

The "residual contract funds", amounting to some $15,000, were taken with Hutchinson's experiments and equipment to the Kalamazoo State Hospital in 1972, when his initial headquarters at the Ft. Custer State Home were closed.

At the time of that move, Hutchinson's projects were given seed money from the state Department of Mental Health to hire more staff and expand the experiments on squirrel monkeys, mice, rats and pidgeons.

Hutchinson said the private funds carried over from the Phillip Morris contract were put into the same checking accounts as the public money for the Kalamazoo State Hospital Research Department.

The accounting process apparently left state auditors baffled on several items when they attempted to confirm and separate the public and private income and expenditures.

"We didn't commingle our ledger entries," said Hutchinson. "We kept a separate set of records. I suppose a better practice would have been to have separate accounts. The fact that our separate record systems didn't satisfy the auditors seems to indicate that something additional was needed."

But Hutchinson said the state auditors failed to acknowledge many of his explanations for the way money was spent by the research department, and the way equipment was acquired and disposed of.

Hutchinson maintains he made every attempt to properly dispose of over $1 million worth of U.S. Navy property that had been declared surplus and consequently acquired by his staff.

He says much of that property was screened and rejected as worthless by the state surplus and salvage offices, so "rather than paying $12 or $14 a truckload to have it hauled to the dump, we sold it, put the proceeds into our private research account, and later used that amount and more to refurbish and paint the Burns Building when we moved to the Kalamazoo State Hospital."

Hutchinson admitted that on one trip to a Lansing surplus materials depot, "Several people from our staff walked through the line and took things for personal use, such as a rifle scope, a sun compass, and a few other items."

"I handled that in the wrong way," Hutchinson said, "The trip (to the Lansing depot) had been announced to the staff by me in such a way that every employee would be able to pick out one item needed for use in the lab, so long as it didn't cost too much.

"When we got back (to Kalamazoo) and I realized that some of these items were for personal use, I ordered the employees to reimburse the lab for the items they got for personal use. What I should have done was to return the items.

"But I thought in my crude way that since the payments reimbursing for those items were going back into our program anyway, it was all right." Hutchinson said he later held two staff meetings and asked that the personal items bought from the salvage depot be returned, and a couple were.

In explaining purchase of a surplus military airplane for the department, Hutchinson said he'd hope the plane could be made airworthy by Western Michigan University transportation technology students and used by the research laboratory for experiments to "measure physiological components of psychological reactions."

"There are a number of physiological responses in flight similar to anxiety reactions you find in disturbed patients," said Hutchinson. "We had a recorder suitable for these airborne measurements, so we thought it would be something worth looking at."

The plane has since been declared by federal aviation officials to be unsuitable for repair and subsequent flying, so it's expected to be scrapped.

A non-profit organization formed by Hutchinson to handle private research expenditures, called "The Foundation for Behavioral Research" was cited in the audit for supplying money for such items as magazine subscriptions to Coin World, for paying Hutchinson's monthly dues in a flying club, and for taking 14 members of the research department staff and members of their families to the Bahamas.

Hutchinson admits the private foundation was, at the time of the trip, made up only of member of the research department staff.

Hutchinson said he asked for leave for the staff members with pay and got it after he told his superiors that a private foundation offered a $3000 grant to the research department staff to attend a "scientific seminar retreat." He said he neglected to tell his superiors that the private foundation was made up of the same staff members who would be taking the trip.

During the trip, Hutchinson said, the staff held meetings to discuss department activities and research and also went scuba diving to observe aggression in fish living on coral reefs.

"Sure it was a cushy surrounding, but all scientific conferences are held in scenic locations. There's nothing that says you have to meet in barren rooms and beat your heads with boring discussions. Let's face it, part of the appeal of professional conferences is the surroundings. Surely even newspaper people have them."

There was no immediate word from other state agencies involved in the research department investigation about whether any action would be forthcoming from the audit.

Hutchinson said his department has received support from other scientists in spite of the controversy, and there are no apparent moves from federal granting agencies to amend their funding. But state funding for the project has been withdrawn, effective at the end of June.

EXTRACT FROM SENATE REPORT NO. 94-236, 94TH CONGRESS, HR 8070, 1976, DEFENDANTS' TRIAL EXHIBIT 24, U.S. D.C., WESTERN DIST. OF WISC.

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The National Science Foundation is the principal Federal basic research agency concerned with insuring that the United States maintains a strong and productive scientific research program. NSF supports basic and applied research projects initiated by scientists throughout the country and at present is funding more than 18,000 projects. The selection, monitoring and evaluation of these projects are the central daily tasks of the National Science Foundation staff.

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The Committee continues to be concerned over the Foundation's tendency to fund what seems to be low-priority research in the social sciences, and, equally important, its failure to be more responsive in explaining its program to the average American taxpayer.

* * *

Along these same lines, several Member of Congress on both sides of the Capitol have expressed their concern over the "closed door policy" of NSF's peer review system. The Committee can understand the well-intended desires of these Members to "open" the grant review system and let the public and principal investigators know who is reviewing the proposals and what comments those reviews contain. However, the Committee feels that the Foundation has taken a significants step in resolving the controversy between advocates of "openness" and defenders of "confidentiality."

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FILE MEMO BY DR. KRASNEGOR, DECEMBER 2, 1975, PLAINTIFF'S TRIAL EXHIBIT 31, U.S. D.C., WESTERN DIST. OF WISC.

Mr. Schwartz, administrative aide to Senator Proxmire, requested information on the status of Dr. Rubin's grant number DA-91134 regarding his IND application to FDA and his application to DEA for immunity from prosecution. I told the Senator's aide that Dr. Rubin's IND request had been approved by FDA and his other application to DEA was still pending.

In addition, Mr. Schwartz asked me about the status of Dr. Hutchinson's contract 271-75-3075— "'Evaluation of

Cocaine on Aggression". I told him that the expiration date was 12-31-75, but that we were going to extend the contract for 3 months (until 3-3-76) to complete his experiments and supplement the work for an additional $11,400 to cover the remainder of the work. He advised me that NSF, ONR and NASA were all dropping support of Dr. Hutchinson's work.

EXTRACT FROM SENATE HEARINGS, COMMITTEE ON APPROPRIATIONS, FISCAL YEAR 1977, PART IV, FEBRUARY 5, 1976, DEFENDANTS' TRIAL EXHIBIT 19, U.S. D.C., WESTERN DIST. OF WISC.

DEPARTMENTS OF LABOR AND HEALTH, EDUCATION, AND WELFARE AND RELATED AGENCIES APPROPRIATIONS FOR FISCAL YEAR 1977

HEARINGS
Before a
SUBCOMMITTEE OF THE
COMMITTEE ON APPROPRIATIONS
UNITED STATES SENATE
Ninety-Fourth Congress
Second Session

Printed for the use of the Committee on Appropriations

PART 4—Pages 1573-2455
DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
Alcohol, Drug Abuse, and Mental Health Administration
Education Division
Health Resources Administration

U.S. Government Printing Office
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DEPARTMENTS OF LABOR AND HEALTH, EDUCATION, AND WELFARE AND RELATED AGENCIES APPROPRIATIONS FOR FISCAL YEAR 1977

THURSDAY, FEBRUARY 5, 1976

U.S. Senate,

Subcommittee of the Committee on Appropriation,

Washington, D.C.

The subcommittee met at 10 a.m. in room 1224, Everett McKinley Dirksen Office Building, Hon. Warren G. Magnuson (chairman) presiding.

Present: Senators Magnuson, Proxmire, Brooke, and Stevens.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Alcohol, Drug Abuse, and Mental Health Administration

Statement of James D. Isbister, Administrator

Accompanied by:

Dr. Robert L. DuPont, Director, National Institute on Drug Abuse

Dr. Bertram S. Brown, Director, National Institute of Mental Health

Dr. Ernest P. Noble, Director Designate, National Institute on Alcohol Abuse and Alcoholism

John A. Deering, Acting Director, National Institute on Alcohol Abuse and Alcoholism

Joseph R. Leone, Executive Officer, Alcohol, Drug Abuse, and Mental Health Administration

John D. Mahoney, Director, Division of Financial Management, Alcohol, Drug Abuse, and Mental Health Administration

Charles Miller, Deputy Assistant Secretary, Comptroller, Department of Health, Education, and Welfare

BUDGET REQUEST

Senator Magnuson. The hearing will come to order.

Mr. James Isbister is with us this morning to discuss the President's budget request for the Alcohol, Drug Abuse, and Mental Health Administration.

Quite frankly, many of the committee members are disappointed over the President's proposal to reduce these very important programs

(1573)

* * *

1608

Basically, this describes an adaptive training plan which includes implementation strategies and which will be unique to each State. The National Institute on Drug Abuse support involves technical training assistance in developing the individual State system, direct funding of specific elements of each plan, and both coordination and support of the information and resource exchange process.

DRUG ABUSE AND ALCOHOLISM

Senator Magnuson. Drug abuse has been singled out by the administration as requiring direct Federal involvement. Many people, however, tell us that drug abuse and alcoholism go hand in hand, and the alcohol budget is way down. Would you please comment on this.

Dr. DuPont. There are many reasons for these different approaches, but the most fundamental one lies in the fact that the drug addict and the drug abuser have not had access to the same medical care system that exists for individuals having other health problems, including alcoholism. Although alcoholism is still not considered a "respectable" illness, there are considerable treatment facilities available in the private health care sector to which he can turn. In fact, federal support for alcoholism treatment and prevention represents only 2 percent of the Nations' investment in that problem. By contrast the National Institute on Drug Abuse presently supports approximately 35 percent of the national investment in treatment care facilities. The existing health system continues to exclude the addict from having access to traditional health care systems; the availability of third party revenues to pay for treatment in such systems is only now beginning to be realized. In addition, a strong Federal presence is still necessary to coordinate the law enforcement aspects of the problem with the treatment and rehabilitation function.

For these reasons, a change in the policy of direct support for drug abuse prevention programs is not yet feasible. Its adoption now would very probably jeopardize the drug abuse health care system that took so much care and effort to build over the past 5 years. When alternative systems are developed within the private sector, or third party payments cover the kind of comprehensive service to the drug addict and abuser that they provide for other health care recipients, a move away from the current policy of direct federal support of drug abuse programs may be feasible.

Senator Magnuson. Senator Proxmire, I'm aware of your interest in this particular area. Do you have any questions at this time?

Senator Proxmire. Thank you, Mr. Chairman. While I have only a few questions, I do feel they are extremely important.

DRUG ABUSE RESEARCH STUDIES

Last year I criticized the National Institute on Drug Abuse for spending more than $1 million to probe marihuana effects on sexual arousal, hypnosis, facial expressions of Americans, marihuana use among the Zulus and the use of Qat by the people in the Arabian Peninsula.

I would like to know why these projects were funded in the first place and what is their current status.

1609

Dr. DuPont. The questions you raise illustrate a common problem in scientific communication. On the face of it, it is not immediately apparent why each study is important. Taken out of context, each might create concern that it represents an inappropriate use of Federal funds.

The National Institute on Drug Abuse is the lead Agency with responsibility for developing an annual report to Congress on marihuana and health describing the health implications of marihuana use for the American people. In meeting our responsibility, our judgment is that we must conduct a wide range of research activities if we are to develop a better understanding of the health and social implications of marihuana use as well as implement successful treatment approaches. For example, it has become increasingly apparent that control of drug use by legal strictures alone has had limited success. Probably the most effective controls on drug abuse are those derived from cultural attitudes and practice which proscribe such abuse. The study of cannabis use among the Zulus of

South Africa promises to provide a better understanding of those factors in a society which actively attempts to control and reduce excessive use. Better understanding may prove helpful in discouraging such use in American society. This project is currently active.

A second study cited, which is also currently active, concerns the culturally accepted use of an amphetamine-like stimulant, Qat, in North Yemen. It seeks a better understanding of those cultural factors which tend to promote moderate drug use. The dissemination of new drugs of abuse throughout the world makes it important that we understand the possible health implications of all drugs, if possible, before they become serious health problems in the United States. The study in North Yemen will provide information on health implications on use of this amphetamine-like stimulant.

The third project, dealing with fantasy patterns and drug use, was completed May 31, 1975. The findings indicated that marihuana smokers displayed higher rates of sensation-seeking, as measured in overt behavior, as well as abnormal involvement in fantasy patterns and daydreams. This characteristic of marihuana users has important implications for treatment by recognizing the need to find alternatives for the sensation seeking needs of the marihuana users.

The fourth project, dealing with psychoative drugs and facial expressions, was completed in December 1975. Findings indicated that persons under the influence of marihuana are less able to recognize human emotions as well as facial expressions of human emotions. These findings are important in suggesting that the heavy marihuana users' impaired recognition of human emotions may severely influence their ability to engage in interpersonal relationships. This also has obvious treatment, as well as counseling, implications.

The final study under consideration studies the effects of marihuana on human sexual responding. Interest in this area has arisen because of earlier evidence suggesting possible impairment of male sexual response related to chronic marihuana use, despite the belief that marihuana enhances sexual arousal. If, indeed, it interferes with such functioning, such information may be an important deterrent to use. An important facet of the Southern Illinois Medical School study is to lay the foundation for further study of possible reductions in the

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EXTRACT FROM SENATE HEARINGS, COMMITTEE ON APPROPRIATIONS, FISCAL YEAR 1977, MARCH 8, 1976, DEFENDANTS' TRIAL EXHIBIT 20, U.S. D.C., WESTERN DIST. OF WISC.

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MISUSE OF FUNDS

Senator Proxmire. The documentation we have indicates that they don't. But perhaps we are wrong.

Dr. Stever, a special committee appointed by the Arizona House of Representatives found that indirect cost funds, were being used by the University of Arizona to purchase various photographic works in order to develop an internationally known collection of photographs. Also indirect cost funds were being used to purchase historical books at a cost as high as $50,000 per edition, as well as helping the university pay for its swimming and diving complex.

In another case, the Office of the Auditor General of the State of Michigan found that Dr. Roland R. Hutchinson, of monkey jaw-crunching fame, misused

public funds, some of which came from NSF. He helped to win a Golden Fleece Award.

For example, the Auditor's Report said: "In violation of State and Federal statutes and rules and regulations specifically relating to the disposition of State and Federal excess and surplus property, the research director sold public-owned equipment, supplies and materials. The research director established a practice of holding closed auctions and pre-priced sales which were attended only by research department staff, friends and associates of the research director."

In light of these examples found by groups other than NSF itself, I would like to know what the Foundation is doing to improve its monitoring of the use of taxpayers funds?

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Dr. Sanderson. Senator Proxmire, as you may be aware, the Federal Government has a policy of having a single cognizant audit agent for each university. For example, most NSF projects are audited not by NSF auditors but by HEW auditors.

We do have a very active audit program. I think we provide through interagency transfers some $700,000 a year to support audits of our projects at universities. I am not familiar with the two specific cases you cite. We will certainly look them up. As we find problems, we go immediately to the university to resolve the issue.

Senator Proxmire. Will you, for the record, direct your remarks to the two instances I have cited?

Dr. Stever. Yes, sir. I thought we had solved one of those two incidents over the past year.

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Page 0022

NSF PEER REVIEW SYSTEM

Senator Proxmire. Dr. Stever, a survey of 1,093 scientists and engineers appearing in the September 1975 issue of *Industrial Research* magazine showed that the overwhelming majority of people in the science community have little or no faith in the workings of the present peer review system.

Only 9 percent felt the system operated fairly and reasonably, but 88 percent felt the system promoted conflicts of interests, cronyism and favoritism. That is about a 9 to 1 ratio. How do you reply to those criticisms?

Dr. Atkinson. That survey was cited a number of times in our congressional testimony this summer. It actually is a very poor survey. It had about a 4 percent return as I recall, and I will supply the exact percentage for the record.

Senator Proxmire. Are we talking about the same survey? This is the latest survey available. It appeared in September of 1975, after your hearings. This is the survey cited in the September 1975 issue of *Industrial Research* magazine.

Dr. Atkinson. I am sure that is the same survey. If you could be more precise in the designation of the survey, I could be certain.

Senator Proxmire. I can tell you that 1,093 scientists were interrogated.

Dr. Stever. How many were interrogated and how many replied? We understand that a very large number of people were interrogated and a very small number of people replied.

AFFIDAVIT OF SENATOR PROXMIRE, JUNE 23, 1976, DEFENDANTS' TRIAL EXHIBIT 1, U.S. D.C., WESTERN DIST. OF WISC.

DISTRICT OF COLUMBIA) ss

AFFIDAVIT OF WILLIAM PROXMIRE

I, William Proxmire, hereby swear, depose and say:

1. I am the duly elected Senator from the State of Wisconsin, currently serving in my third full term which expires January 2, 1977.

2. The United States Senate is now in the second session of the 94th Congress, which convened on January 1, 1975 and has been in session since that date.

3. As a member of the 94th Congress I have received the following committee assignments: Banking, Housing and Urban Affairs Committee, Chairman; Appropriations Committee, Member; Joint Committee on Defense Production, Member; and the Joint Economic Committee, Senate Member.

4. As a member of the Committee on Appropriations I have received subcommittee assignments of the Defense Subcommittee, the Labor and Health, Education, and Welfare and Related Agencies Subcommittee, and the Housing and Urban Development and Independent Agencies Subcommittee, of which I am Chairman (Exhibit 7).

5. The Defense Subcommittee has jurisdiction and review of the budget and appropriations for the United States Navy, including the Office of Naval Research. The HUD-Independent Agencies Subcommittee has jurisdiction over

the National Aeronautics and Space Administration and the National Science Foundation. The Labor-Health Education and Welfare Subcommittee has jurisdiction over the funds for the Department of Health Education and Welfare, which includes the National Institute for Drug Abuse. (Exhibit 8, the United States Senate Committee on Appropriations, Subcommittee Jurisdiction.)

6. The Joint Economic Committee was established pursuant to the Employment Act of 1946, 60 Stat. 23. I have been a member of that Committee since January 26, 1961, and am Chairman of the Subcommittee on Priorities and Economy in Government. The Committee is composed of ten members of the Senate and ten members of the House. The Subcommittee on Priorities and Economy in Government oversees the Government expenditure priorities and makes recommendations and conducts investigations effecting economy in Government spending.

7. In the exercise of my committee assignments, in the representation of my constituents of the State of Wisconsin, and in the general exercise of my responsibilities as United States Senator, I am not only obligated to vote upon appropriations for Government operations but, for subcommittees of which I am Chairman, to make recommendations to the committee for each expenditure (including all expenditures for NSF and NASA. Implicit in that exercise is, according to my information and best judgment, the approval of sound spending and the disapproval of wasteful spending.

8. Information of wasteful or questionable Government spending which comes to my attention, either through private sources, press, committee hearing, or otherwise, is routinely researched by members of my staff. When, in my opinion, the research discloses expenditure which is wasteful or questionable it may be the subject of Senate

floor comments, further investigation, public disclosure, proposal of limiting legislation, vote, or all of these measures.

9. Normal research and legislative action takes the form of agency request for information and explanation, committee hearing where appropriate, legislation, and vote. Occasionally there is a follow-up with agency staff in order to determine the current status of appropriations and pending projects and a renewal of the same general cycle of research and legislative action.

10. The course of action to be followed in connection with any research or disclosure is dictated by me. The ordinary form is that the member of my staff receives the information and after a preliminary inquiry reports his findings to me. The course of action to be followed thereafter is directed and approved by me. Any public release or speech, any committee action, and, of course, any proposed legislation and final vote, are all directly approved and authorized by me.

11. Throughout my Senatorial tenure I have routinely reported my speeches and legislative action to my constituents, my Senatorial colleagues, and to the public at large through the form of press release. The press release is mailed and distributed by the Senate Service Department and mailed under my Senatorial Franking Privilege. (See Exhibit 2, ¶¶8, 9, 11)

12. In 1975, I established a goal for my staff of identifying wasteful Government spending at the rate of one per month. In February and March of 1975 the announcement of what I deemed to be Government waste, which had been researched by my staff, were the subject of Senatorial speeches with a press release announcing the Senatorial speech. In March of 1975 I made the deter-

mination that a monthly speech and announcement would be termed a "Golden Fleece of the Month Award". Following that practice, I issued such Golden Fleece Awards for each month from March, 1975 to the present, a total of approximately 20 awards.

13. Effective July 1, 1974, I authorized the employment of Morton Donald Schwartz, previously an economics instructor at Lawrence University, as a Legislative Assistant on my staff. In January of 1975, Mr. Schwartz was assigned to domestic spending and disclosure and research of any waste or inefficiency in domestic spending. Mr. Schwartz was to report directly to me regarding his findings. In late March or early April of 1975, Mr. Schwartz reported to me concerning National Aeronautics and Space Administration studies on animal and human aggression. I authorized him to make further study of this subject and report his findings to me.

14. Approximately in Mid-April, 1975, Mr. Schwartz delivered to me a draft of a report concerning expenditures by the National Science Foundation, the National Aeronautics and Space Administration, and the Office of Naval Research over a seven-year period, totaling $500,000. The report of Mr. Schwartz's research was reviewed and edited by me and my Administrative Assistant, Howard Shuman. From the final draft of the report Mr. Schwartz was directed to prepare a speech and press release.

15. On April 18, 1975, I delivered a speech on the floor of the Senate announcing the staff research and findings in connection with these expenditures. The text of my speech appears in the Congressional Record for April 18, 1975 (Exhibit 4).

16. In accordance with the customary practice of my office, my Administrative Assistant, Howard Shuman, re-

quested the issuance and distribution of the press release by the Senate Service Department (Exhibit 11, Shuman Affidavit).

17. Subsequent to the speech, Mr. Schwartz reported to me regarding the issuance of patents to Dr. Hutchinson and the Foundation for Behavioral Research. The issuance of patents to recipients of Government grants or contracts raised in my mind the propriety of reward of private or individual patents and I directed that Mr. Schwartz further investigate the propriety of such patent awards.

18. After a preliminary inquiry, Mr. Schwartz prepared letters for my signature inquiring as to the existence of such patents and whether they were appropriate under the terms of the grants. Letters to the agencies were sent out Accordingly (Exhibits 9-11). Responses to these inquiries were received (Exhibits 12-16). No further action was taken with respect to the patents. However, I did make a general inquiry of NSF about its patent procedure. See ¶22 herein.

19. On November 24, 1975, at the invitation of the producer of the show, I appeared on "The Mike Douglas Show" in Philadelphia, Pennsylvania. In preparation for the appearance I reviewed my file of Golden Fleece Awards. Examples of two awards were made on the show, including the one involving Dr. Hutchinson. However, no identification of Dr. Hutchinson was made. A full transcript of my remarks is contained in Exhibit 6.

20. Mr. Morton Schwartz brought to my attention an audit by the State of Michigan of Dr. Ronald Hutchinson and of other reported investigations dealing with Dr. Hutchinson's operations. I have no knowledge of how such audit was initiated. On March 8, 1976, at hearings of the Subcommittee on the Department of Housing and

Urban Development and Certain Other Independent Agencies of the Senate Committee on Appropriations concerning the appropriations for fiscal year 1977 for the National Science Foundation, I questioned the Director of NSF concerning NSF monitoring of public funds. Dr. Hutchinson was an example used in my questioning about funds. I made specific reference to the State of Michigan audit of Dr. Hutchinson and the auditors' report of alleged misuse of state and federal property (Exhibit 20, p. 21). Further, I questioned NSF concerning the sharing of information among different Government agencies as to the merit of particular programs and decisions not to fund projects. (*Id.*, pp. 29-30) Other than this inquiry, no other reference at hearing was made by me concerning Dr. Hutchinson or his work.

21. On March 3, 1975, as Chairman of the Department of Housing and Urban Development and Certain Other Independent Agencies Subcommittee of the Committee on Appropriations, I conducted hearings on appropriations for the National Science Foundation for fiscal 1976. (Exhibit 17, Senate hearings, HUD-Independent Agencies Appropriations, 1976 (HR-8070)—Part 1.) In the course of the hearings, representatives of NSF were asked questions: on various research projects, their cost, and the corresponding benefit for the American taxpayer (*id.*, p. 47); as to whether the U.S. Government obtained title to equipment for which it had provided funds in conducting research (*id.*, p. 89); on the royalties and inventions made under Government grant (*id.*, pp. 99-100); and on the procedures and performance of NSF's internal audit unit (*id.*, pp. 107-108). Pursuant to my request on patent rights of the Government, NSF furnished a report which was later inserted into the record (*id.*, pp. 124-125).

22. Examples of hearings following up my public announcements on wasteful spending are: (1) February 4, 1976, hearings of Departments of Labor and Health, Education and Welfare and Related Agencies Subcommittee for appropriations for fiscal year 1977, the National Institute of Child Health and Human Development inquiry of agency contract of the sexual habits of university women, the subject of my announcement of March 5, 1975 (Exhibit 18, Extract of Senate Hearings, Labor HEW Appropriations, 1977, Part 3, pp. 1293-94); and (2) the February 5, 1976 hearings of the Departments of Labor and Health, Education and Welfare and Related Agencies Appropriation Subcommittee for appropriations for fiscal year 1977, inquiry of the director of the National Institute of Drug Abuse and my announcement of August 27, 1975 regarding a study dealing with the effects of marijuana on sexual arousal (Exhibit 19, Senate Hearings, Labor HEW Appropriations, 1977, Part 4, pp. 1608-09).

23. Prior to the report of Morton Schwartz of my staff, I had never heard of Ronald R. Hutchinson or any of his studies. I was not acquainted with the Foundation for Behavioral Research with which Dr. Hutchinson is associated and am not aware of any of the persons who are members or employed by the foundation. To my knowledge, I am not personally acquainted with, nor have I had any contact with, any of the associates of the foundation.

24. The facts stated in my speech and the television appearance relating to Government contracts with Dr. Hutchinson and his studies, I believed to be true at the time of their issuance. Upon review of these texts in the preparation of this Affidavit, I still believe them to be true.

/s/ William Proxmire
William Proxmire

Subscribed and sworn to before me this 23 day of June, 1976.

/s/ David S. Stevenson
Notary Public

My Commission expires May 14, 1978.

AFFIDAVIT OF MORTON SCHWARTZ, JUNE 23, 1976, DEFENDANTS' TRIAL EXHIBIT 3, U.S. D.C., WESTERN DIST. OF WISC.

DISTRICT OF COLUMBIA) ss

AFFIDAVIT OF MORTON DONALD SCHWARTZ

I, Morton Donald Schwartz, hereby swear, depose and say:

1. Since July 1, 1974, I have been employed as a Legislative Assistant on the staff of Senator William Proxmire of the State of Wisconsin.

2. My original assignment as Legislative Assistant was working with the Joint Committee on Economics (of which Senator Proxmire was then the Assistant Chairman). In addition, I was assigned to review domestic programs. In the 94th Congress beginning in January of 1975, my duties were directed primarily to matters concerning domestic spending and to devise ways and methods of promoting spending efficiency and to uncover and disclose wasteful Government spending.

3. In the performance of my duties I report directly to Senator Proxmire. Additional duties since January, 1975 include matters pending before the Labor-HEW Subcommittee of Appropriations, both review of appropriations

and proposed legislation. Further, I make recommendations to the Senator regarding labor bills and other social legislation.

4. My academic training is principally in the field of economics, with substantial undergraduate study in social sciences. In 1964, I received a BA degree from the City College of New York with an economics major. In 1966, I received a Masters Degree in economics from the University of Michigan. From 1966 through 1969, I was a doctoral candidate in economics at the University of Syracuse, and during that period taught introductory economics. For five years from September of 1969 to June of 1974, I was employed by Lawrence University in Appleton, Wisconsin as an instructor in the Economics Department conducting courses and research in public expenditure analysis, urban economic analysis, and labor economics.

5. Since my employment with Senator Proxmire I have been concerned with efficiency in Government spending. An early example of my research in this area was a study of the growth "grade creep" within the federal bureaucracy. This study resulted in a floor speech and press release in November, 1974. An early example of my research of NSF spending was in November, 1974 and resulting in a press release critical of NSF management and interagency coordination. In that instance, NSF was asked to make a follow-up report, which resulted in a second public announcement by the Senator.

6. My method of research of Government spending in any area of concern has generally been to contact the agency, to analyze the information provided by the agency, to make my findings known to the Senator, to undertake additional research as required, and if warranted, to prepare a speech and press release regarding spending, to assist in

the preparation of appropriation hearings regarding the spending when warranted, and to provide data for legislation and voting.

7. My next major research project dealing with domestic spending resulted in an announcement on March 5, 1975 concerning a National Institute of Health contract to investigate the sexual habits of university women. I made an agency inquiry to determine the facts concerning this expenditure, the amount of money spent, the purpose for the project, and the end result. These findings were reported to the Senator and a letter sent by the Senator to the General Accounting Office for further investigation. A press release of my findings and the letter was issued.

8. Sometime in the Spring of 1975 Senator Proxmire indicated that a monthly announcement of Government spending deemed wasteful would be entitled "The Golden Fleece of the Month Award". The first use of the Golden Fleece Award by Senator Proxmire's staff was in a release of March 11, 1975, dealing with why people fall in love.

9. My next research project resulted in the second Golden Fleece Award dated April 18, 1975 and concerned studies for the Office of Naval Research, the National Science Foundation, and the National Aeronautics and Space Administration on animal and human aggression. The principal investigator or director of the contracts was in each instance Ronald Hutchinson.

10. In March of 1975, I first became aware of the work of Dr. Ronald Hutchinson from an editor of a science and social science publication. He advised that he had learned of Dr. Hutchinson's work from an announced publication by NTIS, a weekly abstract of Government studies and publications. At my request, the editor mailed the announcement to me. (Exhibit 23) The announcement made reference to two National Aeronautics and Space Administration publications. On the basis of the NTIS announcement, I contacted the National Aeronautics and Space Administration's Congressional Liaison Officer, Mr. William Allen, and requested information on the production of the publication and the amount of money involved. Although I am not certain, it is possible that I made a follow-up call to Mr. Allen repeating my original request.

11. I subsequently received in the mail the two publications requested. They were entitled "The Effects of Simultaneous but Unequal Response—Independent Pay to Pairs of Human Subjects on Masseter Emg and Bodily Movements" by Keenan, August, 1974, and "Final Report of February 1, 1974-January 31, 1975, The Measurement and Facilitation of Cooperative Task Performance", NGR 23-014-002, Supplement No. 3, by Ronald R. Hutchinson, principal investigator, Research Department, Kalamazoo State Hospital, dated January 1, 1975.

12. I reviewed the furnished material, the first of which in its acknowledgements on page ii referenced grants to Dr. Hutchinson:

> This research was supported in part by grants to Dr. Hutchinson from the National Aeronautics and Space Administration (NSR-23-014-002), Office of Naval Research (N00014-70-A-0183-0001, NR-201-068), National Science Foundation (GB-33620X), and the State of Michigan Department of Mental Health.

On the same date, April 9, 1975, upon learning of the National Science Foundation grant I reviewed a copy of the National Science Foundation's annual reports from 1973, and found identification of Dr. Hutchinson in those reports.

13. Also on April 9, I contacted the National Science Foundation's Congressional Liaison Officer, Mr. Richard Wilson, and requested material on GB-33620X, and in addition a complete record on contracts or grants to Dr. Hutchinson.

14. Also on April 9, 1975, I contacted Dr. Robert Woodward of the Office of Naval Research and requested material on N00014-70-A-0183-0001 and NR-201-068 and, in addition all available material and records on Dr. Hutchinson's contract or grants and why the agency was funding the particular project. In all of these telephone calls I identified myself as a member of Senator Proxmire's staff.

15. On April 11, 1975, the National Science Foundation delivered a file on Dr. Hutchinson. Upon reviewing it I discovered an additional agency from which Dr. Hutchinson had applied for and received grants, the National Institute of Mental Health. On approximately the same or following work day I called the National Institute of Mental Health and was referred to Joseph Bracket of the Computer Center and I requested all applications by Dr. Hutchinson and all pending applications. Mr. Bracket advised that a number of applications had been made by Dr. Hutchinson, but except for an early grant in 1962, all had been rejected.

16. The NSF material also indicated that Dr. Hutchinson had been funded in part by the Michigan State Department of Mental Health. In order to determine the funding structure of Dr. Hutchinson's work, on approximately April 14 I called the Michigan State Department of Mental Health in Lansing, Michigan, identified myself as a member of Senator Proxmire's staff, and expressed my interest in grants to Dr. Hutchinson. I was referred to a lawyer and other members on the staff, who advised

of facts concerning Dr. Hutchinson's work and funding. I was also advised that the State had involvement with Dr. Hutchinson, along with the National Institute of Drug Abuse.

17. On or about the same date I called the National Institute on Drug Abuse and was advised that there was no grant to Dr. Hutchinson. I later learned that there had been a contract for a study on the effects of cocaine for a total of $151,000.

18. On or about April 14, 1975, I called Fred Stollnitz of the National Science Foundation and discussed with him my findings and that the Senator's staff was comtemplating a Golden Fleece Award concerning the government contracts and NSF grants to Hutchinson. I asked for his comments. The following day I called Stollnitz and told him that a decision had definitely been made to make the Golden Fleece Award and wished to verify the contents and accuracy of my draft of the speech and press release.

19. Approximately one week prior to its delivery on the Senate floor on April 18, 1975, I prepared a draft of my findings on the three agency contracts on human and animal aggression by Dr. Hutchinson. The information and conduct of this draft was obtained primarily from the documentation contained in the Government agency files and supplemented in part by my coversation with the Government contracting officers or agency representatives. My draft was reviewed by Senator Proxmire and by his Administrative Assistant Howard Shuman. After some editorial changes were made, it was finalized on April 15th. I then prepared from the draft both a press release and a speech, which were the same except for the lead and concluding sentences. The text of the speech

was delivered to the Senator and the press release turned over to Mr. Shuman for intended distribution.

20. On or about April 15, 1975, I placed a direct call to Dr. Hutchinson in Michigan and advised him of the Golden Fleece Award. I read to him the text of the intended press release and advised that it had been principally prepared using his own materials and reports for its factual basis. Dr. Hutchinson expressed his dissatisfaction and opinion that the release did not fairly evaluate his work, which he stated in his view was important. He stated that the National Institute of Drug Abuse proposal had in fact already been approved. Other than that error, I asked him if there were any other factual misstatements in the report and he advised that he would prepare his own statement in rebuttal. At this conversation or a second one on April 22 (para. 29 below) he stated that his name was "Ronald" not Roland. I mailed him a copy of the release.

21. On April 17, 1975, I was called by a reporter representing a number of Michigan papers and discussed with him the text of the release. On or about April 17, 1975, I talked with a reporter from the Associated Press and was read the text of an AP wire. He asked for verification of the story and I advised that I knew of no factual inaccuracies in it. He advised me that Dr. Hutchinson had already contacted Detroit representatives of the Associated Press.

22. On April 18, 1975, I had a discussion with another Associated Press representative and again discussed the press release, and was advised that a second AP release was in preparation. Later that same date this same AP reporter called again to say that the second story would not be put out on the AP wire because it was deemed to contain no new news.

23. During the period of approximately April 18th to April 21st I received several other calls from members of the press who asked about the story. I remember specifically that I verified that parts of Dr. Hutchinson's studies included tests with boa constrictors and that Dr. Hutchinson held a PhD from Yale. On approximately April 21, 1975, I received a telephone call from a Mr. Roger Ulrich, who advised that he had formerly been a colleague of Dr. Hutchinson. He advised that Dr. Hutchinson had been under some investigation by state and federal auditors and that research at Kalamazoo State Hospital was being terminated.

24. Approximately the same date of April 21, 1975, I received a call from a Chicago patent attorney who advised of a patent held by Dr. Hutchinson's research organization and read to me a summary of the patent and provided the patent number. The patent concerned the inhalation of nicotine. I expressed my interest and curiosity in the patent. On approximately April 21, 1975, I called the Patent Office and requested a copy of the patent. I received a copy of the patent, called the Patent Office and discussed with the patent examiner who approved the patent what the general process of patent examination was and why it had been granted in this particular instance.

25. About the date of the receipt of the patent I conferred with Howard Shuman of Senator Proxmire's staff and relayed to him the new information on the patent and the auditor's investigation. I expressed my intention to further pursue the patent information.

26. On approximately the same date of April 21, 1975, I called the National Science Foundation and talked with Mr. Stollnitz and relayed to him the information I had

obtained regarding the patent—basically the conversation with the Chicago patent attorney. I also inquired if he knew of the audit and investigation by state and federal authorities. Mr. Stollnitz advised me that he did not regard any audit investigations as determinative of whether NSF would make a grant. I inquired as to what audit procedure NSA maintained on research contracts and was in turn advised that NSF maintained "ongoing reviews" in monitoring expenditure of federal funds within its available resources and personnel.

27. Following that call, on approximately April 21, 1975, I discussed with another staff member regarding the information I had obtained in my discussion with NSF. I decided that I would do nothing with respect to the federal and state audits, but would prepare letters of inquiry to the various agencies concerned with the patent. I advised the Senator of this course of action, which he approved.

28. On April 22, 1975, I prepared letters to the National Science Foundation, National Aeronautics and Space Administration, and the Office of Naval Research referencing the patent and inquiring as to information of the circumstances regarding the patent, which were signed by Senator Proxmire (Exhibits 9-11).

29. On or about April 22, 1975, I received a call from Dr. Hutchinson inquiring what was I trying to do to him and why was I challenging his patent and charging him with criminal activities. I stated that I was interested in the patent and that I was not aware of any criminal charges but of an audit and FBI investigation. He advised that no criminal investigation was in progress since he had been cleared of all criminal charges. I advised him that we intend no further action with respect to any of

these investigations, but that we were sending letters on the patents to the agencies. I also advised that the patent information was not intended to be the subject of any further speeches or announcements. I inquired as to how he had obtained the information of my inquiries and he in turn advised that Mr. Stollnitz of NSF had contacted him. Dr. Hutchinson advised that if anyone were out to get him they would not succeed and I in turn attempted to assure him that Senator Proxmire and his staff had no intention or interest in "getting him".

30. In mid May, 1975, I received in the mail a newspaper article of May 9, 1975 containing information from a Michigan State Auditor General Report dealing with Dr. Hutchinson and that he had been fired. I called Michigan and talked to an assistant auditor general who advised that the entire report was a public document and would be mailed to me. He also advised that no criminal charges were to be brought, upon the findings that although there had been a careless co-mingling of funds and misuse of equipment, there was not sufficient evidence of criminal intent. Upon receipt of the Michigan Auditor's Report, I acknowledged receipt and showed a copy to Senator Proxmire. No other circulation was made of the report by me.

31. In connection with my other investigations of domestic spending I requested of the National Institute of Drug Abuse a computer printout of all current grants. A computer printout was furnished and I identified some 15 grants to researchers which, in my view, appeared of questionable merit. After consulting with Mr. William Pollin, Director of Research at NIDA, I prepared a press release for October of 1975, dealing with several research projects, including one on the effects of marijuana on sexual response. During my discussions with Dr. Pollin

I asked him if he was funding any research projects with Dr. Hutchinson. He advised that they did have funding with Dr. Hutchinson. I inquired if Mr. Pollin was aware of an audit by Michigan State officials and he advised that he was not aware of the audit.

32. In late 1975 or early 1976, I received a call from a NIDA official who inquired about the Michigan Auditor's Report. I advised that it was a public document and that I had learned that no criminal charges would be brought as a result of the report.

33. In December of 1975, Senator Proxmire indicated that he had received an inquiry from constituents inquiring what, if any, follow-ups were made of Golden Fleece reports. He directed that I make a check with agencies to determine the current status of grants that had been contained in the Golden Fleece Awards.

34. Pursuant to instructions, in December, 1975, I called agencies on which I had prepared Golden Fleece Awards, including the one about Dr. Hutchinson. I called the National Science Foundation and talked to Michael Weinberg of the Congressional Liaison Office, who advised that an application by Dr. Hutchinson was under consideration and that the previous funding had expired. I called the Office of Naval Research and talked to Dr. Woodward and he advised that a decision not to renew or extend the grants to Dr. Hutchinson had been made. I called the National Aeronautics and Space Administration and talked to William Allen, who advised that they were winding down on Hutchinson contracts. At no time during any of these conversations did I suggest what action was appropriate, but merely inquired as to the present status of contracts and that the Senator intended a report to his constituents.

35. In January, 1976, I called Mr. Stollnitz and inquired of the current status of the Hutchinson application to NSF and he declined to provide any information. I then called Michael Weinberg and was advised that the decision had been made not to renew the Hutchinson contract.

36. I was aware of appropriation hearings in March, 1976 for fiscal year 1977 for the National Science Foundation, to be conducted by the Appropriations Subcommittee on Department of Housing and Urban Development and certain independent agencies of which Senator Proxmire is a Chairman. I discussed the hearing with Thomas van der Voort, Chief Clerk for the Subcommittee. I prepared questions for Senator Proxmire, one of which dealt with the Hutchinson grants to be asked of the Director for NSF, who was testifying at the hearings. The questions which I prepared were substantially the same as those used by the Senator (Exhibit 18).

37. In connection with my duties I assisted in the preparation of questions for appropriation hearings of the National Science Foundation in March, 1975 for fiscal year 1976. These questions dealt with wasteful spending in social science and the legality of title and ownership of research equipment, royalties on inventions, and patent rights. These questions were prepared prior to any knowledge of Dr. Hutchinson and his work.

38. The topic of wasteful spending in preparation for other hearings attended by Senator Proxmire were prepared by me. Such hearings were held in February of 1976 by the Senate Appropriations Subcommittee on Labor-HEW and Related Agencies for the fiscal year 1977 budget of the National Institute for Child, Health and Human Development. Questions were prepared and de-

livered on the study of sexual habits of college students, which had previously been the subject of a press release. Questions were also directed by Senator Proxmire to the National Institute for Drug Abuse on the study of marijuana and sex. Questions were also directed on the budget for NIAAA, which was the subject of the Golden Fleece Award on October 15, 1975. In the same hearings a copy of Senator Proxmire's press release prepared by me dealing with North American Rockwell was inserted in the record.

39. The information and factual statements contained in the speech and press release I believed to be true at the time of preparation and still believe to be true at the present time.

40. Other than the contacts contained in this Affidavit, I have had no other contact with Dr. Hutchinson. I do not know him personally.

41. All the research and investigation and contacts with Government agencies was entirely performed during normal business hours and from my office in the Senate Office Building.

/s/ Morton Donald Schwartz
Morton Donald Schwartz

Subscribed and sworn to before me this 23 day of June, 1976.

/s/ David S. Stevenson
Notary Public

My Commission Expires May 14, 1978.

EXCERPTS FROM DEPOSITION OF HOWARD E. SHUMAN, SEPTEMBER 15, 1976, U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSON

* * *

[Page 14] Q. Do you know what documents or information Mr. Schwartz received from the agencies in response to his inquiries? A. Well, I'm generally aware of them, yes.

Q. Are those generally the documents that are before you today and that are summarized in the list of exhibits? A. Yes. They are here or in our exhibits, the one that I am aware of.

Q. When did you first see any of those documents? A. I would have seen those documents probably about the second week in April 1975.

Q. Do you know how long Mr. Schwartz had those documents before you saw them? A. Yes. It differed, because he kept finding, as he called around, that there were additional contracts so that he would get a document and then find that there was another document and then find there was another document, and in that process, I pressed him deliberately, specifically pressed him to get all the documents that he could. So I would have seen the documents or knew of their existence as they came to us.

Q. Are you generally aware that the agencies that fund [Page 15] research work have progress reports, both interim and final progress reports? A. Yes, I am aware of that.

Q. Did you direct Mr. Schwartz to obtain copies of those documents? A. Well, I didn't direct him to. I

told him to get as many documents as he could, all the documents he could, and in the course of it, I'm sure he did get documents of that kind.

Q. When you had contact with these documents in the second week of April— A. It's not only a question of directing him to get the documents, it's a question of getting what the agencies give you. Sometimes the agencies have difficulty in getting what they give you.

Q. Do you know whether Mr. Schwartz had any difficulty in obtaining the documents in this case? A. Well, I am unaware of any refusal to produce documents or anything of that kind, but I do know that it was because of the—if I can use a big word—peripatetic nature of the documents, which seemed to be collated in at least four agencies that I can remember, and a large number of them, it took considerable effort and diligence to get them, which he did.

* * *

[Page 17] Q. I asked you earlier if you thought Mr. Schwartz had visited the agencies to review the records and you replied in the negative. A. Well, I said I didn't have knowledge of it.

Q. Okay. Do you know if there was any reason that Mr. [Page 18] Schwartz could not have visited the agencies to review the records? A. Well, one wouldn't ordinarily visit agencies. The agencies are quite good about giving you information if they are cooperative, which they were in this case, so that on the whole, there wouldn't be a need to go to the agency.

Q. Do you know of any rule that prevents Mr. Schwartz from visiting the agencies to review the documents? A. Well, I do know that there is certain information that agencies have and I have learned since this

case came about with respect to the National Science Foundation that there is certain document information they would not let you see. I believe one such kind of document is if they rejected somebody's application and there were criticism of the applicant or something of that nature, they would not show you that document. They do not consider that it's a public document apparently until they have approved it. So, yes, I do know of some instances where you would be unable to get documents.

* * *

[Page 30] Q. The sentence I am referring to, "All this money was given to Ronald Hutchinson of Kalamazoo State Hospital in Michigan," to your knowledge, Mr. Shuman, is that a fair and accurate statement? A. Yes, that is a fair and accurate statement, to my knowledge, and the basis for that statement is that in each of the grants, Dr. Hutchinson—my memory is that in virtually every one, if not all of them, Dr. Hutchinson's name was the name of the principal recipient of the funds. He had control of the funds.

Q. Were you aware that most of the grants were made to various agencies of the state of Michigan? A. Well, I am aware that Dr. Hutchinson was attached to a state hospital as an adjunct professor to a university and that he had a private foundation and that the funds would have gone to him and to them, but he was the principal researcher in all of these documents.

Q. Did you review the documents you received from the agencies to learn who the money was actually sent to by the [Page 31] Federal Government? A. I reviewed the documents to note the amount and that Dr. Hutchinson was the principal researcher.

Q. You do not recall or do not know, though, whether or not the money was paid to the state of Michigan by

the Federal Government as opposed to Dr. Hutchinson? A. Well, Dr. Hutchinson had control of the funds. He was the principal investigator and he's named in the documents.

Q. Mr. Shuman, I am now referring to the fourth paragraph, the sentence reads,

"Dr. Hutchinson told NASA that people get angry when they feel cheated and tend to clench their jaws or even scream and kick."

Is that, Mr. Shuman, in your opinion a fair and accurate statement of what was told NASA? A. Yes, that is a fair and accurate statement, and my memory of that statement is that that is a statement which is similar to a statement which either Dr. Hutchinson made to NASA or which NASA used in describing his work.

* * *

[Page 37] Q. Now, the next paragraph down contains the sentence,

"In fact, the good doctor has made a fortune from his monkeys and in the process made a monkey out of the American taxpayer."

In your opinion, Mr. Shuman, was that a fair and accurate statement? A. I think that's a fair comment from the facts we had before us. We knew that he had received in grants from various Government agencies almost a half a million dollars; we knew that he had received additional sums of money, I think in excess of $100,000, from the state of Michigan; we knew that he had received private grants, I believe the Philip Morris Company was at least one that I was aware of at the time, and that $500,000, plus 100,000, probably close to three quarters of a million dollars, who most people would

consider, and I consider, to be a very, very large amount of money, 40 to 50 times the income of the average family in the country, and I think that's a fair comment from the facts and details and description and amounts given in the document preceding that statement.

Q. Did you investigate to see how much of that money went to Dr. Hutchinson personally as opposed to the state of Michigan [Page 38] or as opposed to paying the salary of other staff members or as opposed to purchasing equipment? A. Well, I was aware from the documents we had before us that those funds went for overhead, expenses, and so forth, as well as to Dr. Hutchinson, if, in fact, they did go to him in that sense, for salary, but the point is that this is a very, very large amount of money which he controlled, which he could use for his research, his staff, his overhead, his rooms, his equipment, and this would have added to his position and status, helped him in his endeavor, given him a position in the institutions that he worked for, so it isn't just merely that he himself may have gotten part of it as a salary, if, in fact, he did, but that he actually physically controlled the funds.

* * *

[Page 44] By Mr. Cavanaugh:

Q. Mr. Shuman, is there anything in this news release that indicates that Mr. Hutchinson was paying a number of staff persons with that money or paying for overhead or the use of equipment or purchase of equipment? [Page 45] A. No, but anybody who has any knowledge at all of Government grants—and thousands of people do—would know that that was probably the case.

Q. Would you agree that thousands of persons who read the newspapers and the news releases similar to this do not know the procedure for Government grants?

Mr. Raywid: Well, I object to that. I don't know that Mr. Shuman's opinion as to what thousands of newspaper readers read is of any help to us in this case.

Mr. Cavanaugh: Well, since he expressed his opinions as to what thousands of other persons might or might not know, I thought I might inquire—

The Witness: Well, I know a great many people who would be aware of this.

* * *

[Page 47] Q. Is the intent or the hope of the Golden Fleece Award to cut down on Government spending or Government waste? A. That would be its intent or, in addition to that, to rearrange the priorities.

Q. What is the purpose of issuing a news release after a Golden Fleece is awarded? A. Well, we don't issue a news release after a Golden Fleece is awarded. We issue a news release when we award the Golden Fleece.

Q. What is the purpose of the news release? A. Well, very simple. There are a variety of methods by which one in public life with jurisdiction over spending, which is a particular congressional constitutional jurisdiction, has of changing, persuading, informing the public in order to get things changed, and one does this through speeches in the Senate, one does this through hearings, one does this through releases, one does this through statements, a whole gambit of methods, and you just do not change priorities in Government by having a Senator go into the cloak room and grab ahold of another [Page 48] Senator and say, "Gee, I hope you vote with me on this." You do it through information, through hearings, through statements, through speeches, through changing public opinion in order that you can do what you hope

to do. So that is the function of this statement and it's absolutely indispensable to the legislative process.

Q. Was the hope of this news release to persuade the public or change public opinion? A. The purpose of this news release would have been to inform the public about some of the spending that has occurred in a Government agency over which the Senator has appropriation jurisdiction and to bring to the attention of the agency that in our oversight function, we were critical of some of their activities.

Q. How does the press release lead to reduce spending or reduce Government waste? A. Well, the only way that one can reduce spending or rearrange priorities is to convince the public in a democracy that that's what should be done, and if you found from experience that you have got a good case and you are correct, then after a period of time you often accomplish your goals. One specific example I will give you is the SST where my Senator led the [Page 49] fight to stop the SST, and the only way we got that stopped was through the changing of public opinion. We didn't get that done by going into the cloakroom and twisting somebody's arm. You did that because the public overwhelmingly thought that was a project that should be stopped and, as a result, we stopped it narrowly.

Q. Is it a hope, then, that the public responds to the news release? A. Well, you hope that a variety of people in the public and in the Senate and in the Congress and in the agencies, those that are concerned with public affairs, would respond in a general or a specific way to a release or a statement. This isn't just a release. You are talking about a speech in the Senate, a release, a hearing, a whole gambit of activities in which this is only a small part.

* * *

[Page 55] Q. After the news release was prepared by your staff, what happened to it? A. Well, when the news release was prepared, I would have filled out a card and that card would have said what the distribution of the release should be. We have at the Service Department of the Senate—I don't know the technicalities of it—but we have lists of people who would get releases as we check them off, and in this case, I put on that card who was principally responsible for the release, which in this case was Schwartz, and I was responsible for saying what the distribution would be and I checked the general distribution. We often send it out to a much, much larger group, a release, but in this case, we limited it to the general group, general distribution.

Q. What groups or bodies are composed in the general distribution group? A. Well, that list is provided in the documents that have [Page 56] been made available to the Court.

Q. The ones attached to the affidavit listing the newspapers, radio stations? A. Yes. Not only newspapers, radio stations, but a number of individuals, members of the Senate, staff, people on committees, who have asked or who need to know or should know what statements the Senator has made and who would be involved in hearings and reports and possibly could follow up on such statements, so it's more than just the news media.

Q. Do you have several distribution lists, some smaller, some larger, and some very large? A. Yes, we have a number of them. We have our general list, we have a state list which would be all the daily papers and the radio, TV in the state, we have an additional state list, which would include the weekly papers, we would have a list for housing. I think we have a banking

or financial list because of the Senator's interest. I think we have an economic list. That card is available. You can read it. But there are several lists and, in this case, we sent out to the general list.

Q. You mentioned that you had a list of state newspapers. Are you referring to Wisconsin newspapers? [Page 57] A. State of Wisconsin, right.

* * *

[Page 70] Q. When was your statement actually released to the newspapers? A. Well, the statement would have been sent out by the Service Department of the Senate the late evening of April 15.

Q. Then do you mark the news release for release at a certain date? [Page 71] A. Yes. It's embargoed. In other words, it cannot be used until after 6:30 a.m., Friday.

Q. Which was the 18th? A. Which was the 18th. And the reason you do that, first of all, when you send this out, because of the mails, you are not so sure that a release sent out the 15th will be delivered the 16th, it probably won't; it probably won't get delivered until the 17th. The release on this was timed to be released essentially simultaneously with the speech in the Senate and that date and time was done for that very purpose, to give a statement to the press of the substance of the Senator's remarks.

Q. Did you— A. So the date of the release is Friday, April 18, not the 15th when it would have been sent out, because it's embargoed.

Q. Did you receive any request for information from the news media as a result of this news release? A. Did I?

Q. Or the staff. A. Well, there was a request for information as a result of Dr. Hutchinson's rebuttal.

* * *

SHUMAN DEPOSITION EXHIBIT 2, NEWSLETTER BY SENATOR PROXMIRE TO CONSTITUENTS, FEBRUARY 1976, U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

February, 1976

DID THE GOLDEN FLEECE GET RESULTS?

1975 was the year of the "Fleece of the Month" award. More than a dozen federal agencies earned it. The award was for the biggest or most ridiculous or ironic example of waste or stupid government spending that month.

At the end of December, the monthly awards were topped off by a "Golden Fleece of the Year" award.

There has been a great deal of interest in the awards and some lively controversies about them.

Did the monthly "Fleece" awards do any good? Did the agencies act to reform these abuses or did they duck, cover-up, and excuse their behavior.

Before the answer to that question, in case you missed some of them, here are the monthly winners.

THE WINNERS

—The first award went to the National Science Foundation (NSF) for spending $84,000 on three research contracts to find out why people fall in love.

—The NSF, the Space Agency, and the Office of Naval Research won the "Golden Fleece" for spending jointly $500,000 to determine why monkeys clench their jaws.

—The Selective Service was the winner for a $98,000 study on the need for an All-Volunteer Army after the All-Volunteer Army had been established.

—The Army Corps of Engineers got the "Fleece" for their effort to commit $6 to $10 billion to build a series of new locks and dams on the Mississippi River under a little known 1909 law designed only to provide funds for the maintenance of existing structures.

CONGRESS GETS IT

—Congress won the award for living high off the hog while much of the rest of the country was suffering from economic disaster. The big examples were increased Senate staff allowances, a $10 million House increase for equipment, phones, etc. and a new Senate Office Building to house all the new staff. The ultimate absurdity was the $1.3 million the House spent to automate 19 elevators while retaining the operators to run them.

—The Bureau of Land Management was the winner for issuing a 155 page list of requirements, including 23 fold-out diagrams, for fire equipment to be placed on two pick-up trucks. The equipment which cost about $4,000 was awarded to the low bidder for $15,497 because of all the extra time it took to fill out the forms. It took eight to 10 people just to push the paper.

—The Federal Aviation Agency got its "Fleece" for spending $57,800 to produce a 103 page report on 79 body measurements of airline stewardess trainees. It turned out that the information was useless for safety purposes which was said to be the reason for the study. Each of the 55 North American airlines has its own standards for selecting stewardesses—age, height, weight, education, etc. —so this particular study could not be used by them.

The Navy was a big winner for using taxpayers' money and 64 aircrafts to fly 1,334 officers to the Hilton Hotel in Las Vegas for a reunion of the private, non-governmental "Tailhook Association" composed of pilots and former pilots of Navy planes. They did this during the height of the energy crisis.

STEWED TO THE GILLS

—The National Institute on Alcohol Abuse received the award for spending $102,000 to determine if drunk fish are more aggressive than sober fish. They seemed to be interested in testing what it means to be "stewed to the gills" or the meaning behind the expression "he drinks like a fish."

—Energy Czar Frank Zarb got the "Fleece" for his practice of commandeering plush government jets to fly around the country urging business and civic groups to conserve fuel. His 13 flights in 1975 cost the taxpayers $25,000 and used 19,000 gallons of fuel. Half the time he flew in four engine jet planes which burn enough fuel in one hour to supply the average American driver with enough gasoline to drive for a year.

—The White House joined Congress as a "Fleece" award recipient for its increased spending for consultants, contingencies, travel, and high level personnel while calling for austerity from the rest of the government.

These monthly "Fleece" awards culminated in the "Fleece of the Year" award which the Air Force won. It operates a $66 million fleet of 23 plush jets. They made 975 flights in the first 10 months of 1975 to transport high ranking government officials almost everywhere in the world at a cost of at least $6 million to taxpayers. These flights carried 875 Administration officials and 100 flights were for Congressmen and Senators.

ACTION OR INACTION

Now the answer to the question, did the monthly "Fleece" awards do any good?

In a few cases nothing happened. In most cases the agencies were shamed into changing their ways.

Here is what happened:

SUCCESSES

The National Science Foundation did not renew two of the three contracts to consultants studying "love." The big thing they did was to review their procedures to give less provocative names to their studies.

All the studies on why monkeys clench their jaws were dropped. No more monkey business.

The Army Engineers saw the light and have now asked Congress to specifically authorize funds for Lock and Dam 26 instead of trying to do it through the back door.

Congress did cut out two out of three of the extra staff originally proposed. But the "automatic" elevators still have operators.

The Navy has announced that it will no longer fly the "Tailhook" Association or similar groups free of charge at taxpayers' expense. And Mr. Zarb has mended his way somewhat. He flew by commercial plane from Alaska to Washington shortly after he got the "Fleece."

The White House has announced a reduction in staff to a figure below 500.

All in all, there have been numerous successes by calling these excesses to the public's attention.

FAILURES

But in some areas there are failures.

At Selective Service the young man who did their study on the All-Volunteer Army was rewarded with a job at the Defense Manpower Commission because of his expertise in the All-Volunteer Army. But good news: the Selective Service Agency itself has been virtually abolished.

The problems of extra paperwork continue. They are never-ending. One answer is my bill to outlaw every form at least once every five years. Under it no new form could be issued or old form re-issued unless its need was proven and it was shortened and simplified.

The Air Force and its fleet of 23 plush planes goes on.

The ultimate failure is that the National Institute on Alcohol Abuse refuses to call off its studies to find out if drunk fish have more fights and are more aggressive than sober fish.

We seem to be unable to stop the fishy funding.

STILL YOUR HIRED MAN

If there are any specific ways in which this office can be helpful to you on a personal basis such as with a Social Security claim, military problem, Academy appointment, postal problem or veterans' claim, please drop a note, including your social security number and your phone number to 5241 New Senate Office Building, Washington, D.C. 20510.

YOUR NEWSLETTER

In order to eliminate any extra cost in the newsletter mailing, please return all extra or incorrect labels with the sequence number, indicating what is wrong to 5241 New Senate Office Building, Washington, D.C. 20510.

WELCOME TO WASHINGTON

If you are coming to Washington for the Bicentennial, please write for a copy of my 35-page booklet "Welcome to Washington." This helpful guide contains suggestions for a number of walking tours of historic areas in and around the Capital City. In addition, it provides a complete listing of the hours of operation for all major attractions.

/s/ William Proxmire
U.S.S.

SHUMAN DEPOSITION EXHIBIT 7, EVALUATION OF PROPOSAL FOR RESEARCH ON ENVIRONMENTAL CAUSES OF AGGRESSION, RONALD R. HUTCHINSON, U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

This proposal requested renewed support for Dr. Hutchinson's systematic studies of the causes of aggression in several species, including man. The studies are designed to develop the base of biological knowledge needed for efficient and fruitful research on the causes of human aggression.

Previous research by the principal investigator and his colleagues had demonstrated that pain causes animals to attack members of the same or other species, had discovered that inanimate objects would also be attacked, had developed objective methods of recording biting attacks on inanimate objects by squirrel monkeys, had demonstrated that withdrawal of food rewards or cessation of morphine injections causes such attacks, and had started to explore the physiological basis of aggression in animals. In much of this work, the experimental conditions had

been systematically varied to determine the quantitative properties of the aggressive responses. The first steps in extending the findings to human aggression had also been taken by demonstrating that withdrawal of monetary rewards or cessation of tobacco smoking produces intense jaw-clenching with quantitative properties similar to those of the biting attacks of animals.

The proposed research was to further investigate the conditions that produce or diminish aggression. Biting attack by squirrel monkeys on an inanimate object was to be measured under a variety of conditions, using pressure transducers to relate bite force to attack probability, frequency, and duration, and using electromyographic recording to relate the results to those obtained for human jaw-clenching. Isolation of human subjects for 30 to 90 minutes was to be studied as a condition producing jaw-clenching, and the relationship of aggression produced by isolation to that produced by painful stimulation was to be studied by testing mice that had been housed either in isolation or in social groups. In all of these studies, the quantitative properties of the aggressive responses were to be the basis of comparisons between conditions or between species.

The proposal was reviewed by the Psychobiology Program, with the assistance of four mail reviewers and the eight-member Advisory Panel for Psychobiology. Two program officers were present during the Panel discussion.

All reviewers recognized the value of Hutchinson's systematic, quantitative approach to an important research area that has often been plagued by subjective techniques. There was also general agreement that Hutchinson is a highly competent, hardworking, and productive investigator, and that his experiments are well designed and well executed.

Several questions arose and were satisfactorily answered. The link between the work with human subjects and that with other animals was one of these. Most reviewers were satisfied that Hutchinson's previous and proposed comparative studies were establishing a sound basis for revealing similarities and differences among species, and that his animal models for human aggression had been chosen for good reasons. Experiments with human subjects did not involve painful stimulation or administration of drugs, and provisions for informed consent and for protecting the rights, health, and safety of human subjects were well documented in the proposal.

The techniques used in the research are increasingly focused on narrowly-defined bits of behavior, which are thus increasingly remote from naturally-occurring behavioral patterns, but this restriction is what permits Hutchinson to automate his experiments and thus efficiently record quantitative data on objectively-defined responses. The use of only a few subjects in most of the proposed experiments was viewed as being adequately justified by the orderly, and thus predictable, nature of the data. Indeed, the most important reservation about the proposal was that the results were *too* predictable, that the research was proceeding slowly because of the small steps from previous work to that proposed. Yet it was recognized that Hutchinson and his colleagues had already made substantial progress in this fashion, and that his careful, systematic approach allowed him to introduce innovative techniques without leaving too great a gap between the new results and those of his previous work.

In sum, the proposed research was expected to contribute systematic but not spectacular advances to our knowledge of a topic that has very direct bearing on important human problems. All reviewers favored support for the project.

Although some reviewers considered the budget reasonable for the amount of work proposed, others recommended moderate reductions. Taking into account the limited funds available to the Psychobiology Program and the fact that ONR was supporting a related project, the Program Director discussed the budget with Dr. Hutchinson. Satisfied that a severe reduction in budget would still permit much of the proposed research to be performed, the Program recommended support for three years, with annual budgets totaling $18,100, $17,300, and $16,400, less than half the level of support requested.

SHUMAN DEPOSITION EXHIBIT 9, REVIEW OF RESEARCH CONDUCTED BY RONALD R. HUTCHINSON AT KALAMAZOO STATE HOSPITAL UNDER CONTRACT WITH THE OFFICE OF NAVAL RESEARCH, U. S. DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

Aggression is a ubiquitous phenomenon among man's responses to various unpleasant stimuli. From one point of view the military is presented with a dilemma when dealing with aggression. On the one hand aggressive, hostile, destructive action is desired and encouraged when it is directed toward an enemy. On the other hand this same behavior could be disastrous if it were to extend outside the desired arena and be directed toward members of one's own group. The study of aggression, its causes, the internal conditions underlying it, the expression of aggression in the form of hostile acts, and the control or aggression in situations in which its expression would be inappropriate or disruptive—is an appropriate undertaking for military research. Here, too, the researcher is faced with a dilemma, for while much can be learned

by observing aggressive behavior as it occurs in daily life, no humane researcher can manipulate events and people so as to observe the varying degrees of hostility as the situation is altered in one form or another. Thus, in order to develop a more complete understanding of the causes and underlying physiology of aggressive behavior and techniques for controlling such behavior the researcher must turn to animal models.

It is with this background in mind that research on aggressive behavior was undertaken by the Office of Naval Research. Clearly there are numerous instances in the Navy where personnel must interact for relatively long periods of time, e.g. shipboard, submarine, or patrol aircraft. Misdirected or otherwise inappropriate aggressive behavior easily could be disruptive in such situations.

The research undertaken by Dr. R. Hutchinson had included among its objectives the identification of environmental and physiological events which result in aggressive behavior, the quantitation or measurement of these events and reactions, and the identification of possible techniques for reducing aggressive behavior in response to these events. The approach was experimental and used rats and monkeys as experimental subjects. The response chosen to be measured was the animals' biting on a specially designed device in response to unpleasant stimuli of varying frequency and intensity. The biting response is recognized as a hostile event and with the use of the biting device, the frequency, intensity, and duration of the response can be quantified. Thus both the stimulus and response characteristics of the behavior can be measured quite precisely.

In the course of experimentation, the investigator, using varied animal models, verified that jaw clenching is

a fairly reliable indication of the possible onset of overt aggressive behavior, which might be expressed verbally or physically or in some other form. He also established a means of measuring the increasing amount of aggression produced by unpleasant stimuli as evidenced by biting behavior. This could lead to techniques for determining when aggression in an individual is approaching a danger point. A third finding demonstrated that when an innocuous event, which originally occurred at the same time as an unpleasant stimulus that produced aggression, is later repeated, then aggression can be triggered even though the unpleasant stimulus itself is not present. It was also demonstrated that extended exposure to stressful situations produced a condition of hyperirritability and hyperactivity even when the original unpleasant stimulation was no longer present.

Different pharmaceutical agents were tested, and it was shown that (1) certain tranquilizers increased general motor activity while decreasing attack behavior, and (2) that stimulants such as amphetamines, which are sometimes used during long work hours to produce alertness, tend to increase both types of behavior at initial dose levels but then tend to decrease both types as dose level is increased. Measurements were also made as to what degree excessive caffein can cause aggressive behavior.

This research has provided the Navy for the first time with an objective scientific testing system for measuring and examining aggressive behavior, and this permits, for example, an evaluation of specific effects of various pharmaceutical agents on these behaviors. Such information could well lead to procedures which would permit control and modification of aggressive behavior in situations where that behavior would be inappropriate and disruptive.

The results of the experimentation have been presented at national and regional meetings of Federation of American Societies for Experimental Biology and the American Psychological Association. Also, the results have been published in journals such as *Life Sciences*; *Journal of the Experimental Analysis of Behavior*; *Physiology and Behavior,* and have been reported as chapters in recent books, e.g. *The Nebraska Symposium on Motivation*; *Operant Behavior,* Volume II; *Schedule Effects Drugs, Drinking and Aggression.*

It should be noted that Dr. Hutchinson's work was supported by the Office of Naval Research over a six-year period at an average of $34,500 per year for all costs, including the use of animals and overhead. This is considered a moderate expenditure by the Navy for basic research.

SHUMAN DEPOSITION EXHIBIT 12, "REASON FOR NASA SUPPORT OF WORK BY DR. RONALD R. HUTCHINSON", U. S. DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

The National Aeronautics and Space Administration is sponsoring a program of research to develop improved selection and training methods for crews of space vehicles. This will be of particular importance in possible future long-duration manned space flight. Since crews would be required to live and work together in confined spaces for long periods of time, it will be important to choose people who can work together effectively.

One of the first objectives of this project was to develop measurements of latent anger or aggression in order to measure the development of interpersonal hostility in

normal people brought into the laboratory. It was demonstrated that at least one measure, jaw clenching, may be an appropriate indicator for this purpose. This technique records the electrical discharges from the jaw muscles (the masseters). With such recordings an indication of hostility is obtained, apparently even when the person is unaware of any change in his attitude, and unaware that his jaw muscles have tightened.

This particular indicator of anger has been used in laboratory studies to assess conditions which produce anger. If anger is inappropriate or misdirected, it can lead to less effective crew performance in carrying out the assigned tasks of the group. In addition, it is possible this measure could be used to identify people likely to become angry and aggressive in a given situation and thereby compromise their performance, especially on future long-duration manned space missions. It is hoped that measurement techniques that are reliable and noninvasive can be applied, ultimately, to the actual selection procedures for crew members, and will identify in advance people who may react in such a manner as to jeopardize crew functioning under conditions of extreme stress.

EXCERPTS FROM DEPOSITION OF MORTON SCHWARTZ, SEPTEMBER 15, 1976, U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

* * *

[Page 8] Q. What did you next do regarding Dr. Hutchinson or his work? A. I examined the documents sent to me and decided it was worth pursuing further to have a better understanding of the nature of the work, and so I contacted Congressional Liaison of NASA and

asked them for copies of the reports listed in the document that I had received and also the costs involved to the Federal Government in the work associated with the reports, the documents.

Q. Do you recall approximately when you contacted NASA? A. Approximately April—it was during the first week in April.

Q. Did you contact any other Federal agencies at that time? [Page 9] A. No.

Q. Did NASA send you the documents you requested? A. Yes.

Q. What documents did they send you? A. They sent me a copy of Mr. Keenan's Master's thesis and the progress report of Dr. Hutchinson supplied to NASA, I believe it was supplement No. 3 for the period of calendar year 1974. Actually it was February 1, '74 to maybe January '75.

Q. Is that report one of the reports that's contained in your records which was turned over to Mr. Raywid and he, in turn, showed us this morning? A. Yes.

Q. What did you do after you reviewed the documents from NASA? A. I noticed in evaluating those documents that, particularly in the Keenan, in his acknowledgement page, he acknowledged a number of agencies as having helped to support the work. Listed was the Office of Naval Research, NASA, which obviously I had some of those documents in my hand, the National Science Foundation, and the state of Michigan Department of Mental Health. I then began a process of contacting the Federal agencies [Page 10] which were listed as contributing to this work.

Q. Who did you contact at each of the Federal agencies? Do you recall the name of the person? A. At Congressional Liaison at NSF, it was a Mr. Wilson that I got, and I don't recall precisely the first contact at ONR, but the contact I remember getting as the one who was the program manager of this work at ONR was Mr. Robert Woodward.

Q. Did you—excuse me. Were you finished? A. Yes.

Q. Did you request documents from Mrs. Wilson and Mr. Woodward? A. I'm sorry. It was mister. Masculine.

Q. Mr. Wilson? A. Yes.

Q. Did you request documents from those two individuals? A. Yes.

Q. What did you request? A. I requested all contracts, progress reports and financial information on the work under the contracts which were listed in the NASA document, the Keenan document. The exact citation as to the project was listed, and so I was able to give them the project by number in each case and said I wanted all [Page 11] information on that contract or any other contract flowing around that work.

Q. Were those documents then sent to you? A. Yes.

Q. What did you next do in investigating Dr. Hutchinson's work? A. I received the documents and began to evaluate them. I worked first with the National Science Foundation documents which were quite extensive and spent a number of hours examining these documents. They included progress reports, grant proposals in which Dr. Hutchinson reviews his work, the progress on what he

intended to do in the future. In addition, it included some communications between Dr. Hutchinson and the National Science Foundation, it included a document which was a summary of an office visit that Dr. Hutchinson had with Mr. Fred Stollnitz of the National Science Foundation, and I can't remember, there was another individual in that conference.

Q. Excuse me. Was that an office visit to Mr. Stollnitz's office? A. To Mr. Stollnitz's office as I remember it from the documents. In addition, I had asked for an evaluation, a justification of the funding of Dr. Hutchinson from the National [Page 12] Science Foundation.

Q. Did you receive that? A. Yes. And I evaluated a large amount of material. In it was some summaries of ONR, Office of Naval Research, grants and summaries of grants, and so I proceeded to evaluate that very large package.

Q. Do you still have the justification you received from NSF? A. Yes.

* * *

[Page 15] Q. Have you ever said or indicated to any of these Federal agencies that you or Senator Proxmire would be pleased or would desire to have Hutchinson's funding cut? A. It would go against office policy to make that kind of statement and I did not.

Q. Have you ever made that implication to any person within one of the Federal agencies involved in this matter? A. I wish you would explain what you mean by "implication."

Q. Have you ever stated anything to someone at NASA, NSF, NIDA, or ONR the implication or tone of which would be to indicate your or Senator Proxmire's

displeasure with their continued funding of Dr. Hutchinson? A. I want to be responsive to your question.

The nature of the press release reflects our feeling that in Senator Proxmire's review of public expenditure and the staff doing it as part of his legislative duties, that we felt in looking at the priorities of Government spending that this was something that should not be receiving high priority. That was stated in the press release.

Q. Has that feeling been expressed by telephone or in [Page 16] person to anyone in the agencies that I have mentioned? A. I had a conversation with Fred Stollnitz on April 14 and on April 15 in which I discussed the criticisms which became part of the press release, so in that sense, in discussing the work we were involved in, the feeling that our evaluation was that in terms of public spending and evaluating it broadly in terms of alternatives and the kinds of things that Senator Proxmire is in charge of, the National Science Foundation in particular, that we felt that this was not something that should be receiving high priority.

Q. Was that 1975? A. That was April 14, 1975 and 15. It was the sum and substance of what later became the press release.

Q. Did Mr. Stollnitz reply to you? A. Yes. We had some discussion in which he really, I guess, may have been reading from this document which later came over to me. I had received the fundamental package of National Science Foundation material a number of days before and this evaluation had not come across yet and that was one of the reasons I was calling Stollnitz. I wanted more information on why they were doing this because I was going to give them an indication of our criticism. I wanted his defense. And he said [Page 17]

that basically the work was sound. I would honestly say he did not defend it as the most important research but said that some progress was being made in this area, that it was an area of not great theory having been built yet, so this kind of empirical research did add to the body of knowledge. Again, something that I raised, which we discussed, was the fact that it appeared as though the steps were extremely small, that the work appeared to be replicating through the entire animal kingdom, and he said yes, it was true, it was something that was bothering the people who were evaluating the work but that on balance, they felt that it was worth continuing.

Q. Did you ever talk to Mr. Stollnitz by telephone on any date other than April 14 or April 15, 1975? A. Yes. I spoke to him in January before my telephone conversation—am I allowed to correct now if something comes to mind about another conversation with Michael Weinberg?

Q. Sure. Go ahead. A. Because it was in December that the constituent asked Senator Proxmire and I contacted Mike Weinberg on a broad number of fleeces that had touched on NSF. Many of them I had not been involved in, but I made that phone call, and in discussing Dr. Hutchinson's work in December, it was made clear to me by Mike [Page 18] that Hutchinson was no longer being funded, that is, the grant had run out, but that he did have a proposal which had not yet been fully evaluated by the staff. Senator Proxmire, in preparation for a news release in January, I wanted to make sure I had all the information up to date and correct and I contacted Fred Stollnitz initially because he would be the one who would have at his fingertips the situation with Hutchinson and it was the one that appeared to be hanging. Mr. Stollnitz refused to acknowledge that there was

even a grant proposal and I said I was aware of it and he said, "Well, I don't believe I have to tell you anything, I don't have to tell you if there is a proposal or not," and I said, "You are telling me—as a representative, I am seeking information, my Senator's legislative duties are to check on the appropriation, the public spending of funds by the National Science Foundation—that you are not going to give me this information?" And he said, "Well, that's it, you will have to get it from someone else," and I said, "I sure will," at which point I contacted Mike Weinberg and the conversation which I described as occurring in January occurred.

Q. Was Mr. Stollnitz hostile on the telephone with you in January of '76? [Page 19] A. He certainly was not cooperative and I would think the word "hostile" would be appropriate.

Q. After talking to him for a while, did you become hostile? A. Yes. I was upset.

Q. Did you say anything to Mr. Stollnitz at that time about the funding of his agency? A. I was angry. I told him I would get that information. I did not in any way threaten his agency. First of all, it's not my authority to threaten them and I just didn't have the power to. I realize that I am a Legislative Assistant to William Proxmire and I certainly can't threaten a low level official of an agency because I don't have the authority to and I certainly couldn't carry out that threat and it would serve no purpose to antagonize him further, but he had antagonized me because it is his job to supply information. He felt he wanted to go through Congressional Liaison, I guess, and yes, I was upset with him and told him so.

Q. What is the normal procedure for obtaining information from a Federal agency such as NSF? A. It depends what information you want and what the purpose is. In general, a first contact is made with the [Page 20] Congressional Liaison people. However, as you have worked in the field and you begin to know people, the Congressional Liaison quite often will merely turn you over to the person who has the precise information or will get it for you, and in the case of my long-term working relationship over two years with NSF, I know many of the people in the agency at all levels and, therefore, I make direct telephone calls to the people who I know would have the information. When I'm not certain who would have it, then I would call up the Congressional Liaison Office, so that you always begin with Congressional Liaison. The more information you have, the more quickly you can get through to the people who have the information. In other words, the more you know about the personnel and their authority and their information, you can reach right in and get the right answer.

Q. Are there any written rules anywhere that you are aware of that deal with who a congressional aid should contact at a Federal agency when seeking information? A. I don't know of any. I would think that we have great latitude. The process of legislation, appropriation, oversight, I don't believe there are any rules governing how I should go about contacting people.

* * *

[Page 25] Q. Briefly, Mr. Schwartz, what are your duties? A. Fundamentally my title is Legislative Assistant. It's my job to work with the Senator in his legislative duties. That involves advising him on pending appropriation and authorization bills before the floor of the Senate. That's one of the roles I play. My specific areas are in the social programs.

Q. Approximately what percent of your time would be spent advising the Senator? A. Advising the Senator—I'm sorry. I mean I advise him constantly. My work is constantly advising him.

Q. All right. Let me make it more specific. [Page 26] A. Please.

Q. What I would like you to tell me is briefly what you do, what your duties are, and I assume there are a number of subduties and I would like you tell me approximately what percentage of your time is spent on each of those subduties? A. Preparing for hearings, background on committee assignments of Proxmire. In other words, I will monitor the status of bills under, for example, the appropriation. I will watch it as it comes across the House, check the amendments, check what might be controversial for the Senator in let's say Labor, HEW appropriations. As it comes to the Senate, my job will be to monitor the important hearings. If an issue that Senator Proxmire is particularly interested in is coming up, it's my job to inform him of it, if he wants to make a statement, prepare that statement, do the background, and after the hearing, to monitor it as it goes from the subcommittee to the full committee, same procedure from the full committee to the floor. On the floor, if he's interested enough, I will pursue it by being on the floor with him, prepare his speech. From there it goes to conference, that would be following the line of strictly legislation.

Now, where he is in charge and he has hearings, for example, [Page 27] National Science Foundation, there his job is to evaluate the programs directly as chairman, the issues broadly involve him as opposed to specific things in Labor/HEW. In that, I will pick out a subarea because there are a number of other staff people working on it. In the case of NSF, for example, I have had a great

interest in how well they coordinate with other agencies. That's been an interest of mine. How well do they share information, how well do they monitor after the fact the kind of work that they are funding.

Q. Mr. Schwartz, would you say that generally your duties break down into advising the Senator, preparing information for him to use on the floor or in committee? A. Yes.

Q. As one broad category? A. Yes.

Q. And as another broad category, answering inquiries or working on inquiries that come into the office from constituents? A. That is not quite a separate function. I mean, it depends how you want to play games with functions because quite often these inquiries are directed at areas that Proxmire controls and will involve me in investigation which leads to hearings. That happens quite frequently.

[Page 28] Q. That's something you do on a regular basis? A. Yes.

Q. Did you receive justifications from agencies other than NSF prior to the release of the news release? A. Prior to April 18?

Q. 1975. A. Yes.

Q. What other agencies did you receive justifications from? A. NASA, and I believe I had received ONR. I believe I had. I had received NASA and I received ONR also. To the best of my recollection. To the best of my recollection on ONR.

Q. Would you look at what has been marked as Plaintiff's Deposition Exhibit No. 9 this morning and tell me if that is the justification you received from ONR? A.

To the best of my recollection, this is. I have not examined this document in detail and I did not retain a copy of the document, but as I have looked at it, it does appear to be the justification I received prior to the April 18 floor statement.

Q. Thank you.

Would you look at what has been marked as Plaintiff's Exhibit [Page 29] 12. Is that the justification you received from NASA prior to April 18, 1975? A. Yes.

Q. Do you know approximately when that document was received? A. It was while I was preparing—on or about the 14th of April.

Q. Mr. Schwartz, let me show you what appears to be a buck slip from NASA, dated 4/10/75. Do you recall if that buck slip was attached to that NASA justification? A. I don't remember this buck slip, but the writing on the bottom clearly I did not receive, but it very possibly is the document I received. I just cannot completely—you know, my assumption is it is the document but I have no recollection of it.

Mr. Cavanaugh: So that the record is clear as to what we were referring to, would you mark this as Plaintiff's Exhibit No. 13.

(Document referred to was marked Plaintiff's Deposition Exhibit No. 13 for identification and subsequently attached to the court copy of this deposition.)

By Mr. Cavanaugh:

[Page 30] Q. Mr. Schwartz, can you look at what has been marked as Plaintiff's Exhibit 8 from this morning's deposition and tell me if you recognize that document? A. Yes. As I recall, this was included in the

material I received from—yes, I remember distinctly now because it said, "It is understood that NSF and NASA are also considering similar research proposals from Dr. Hutchinson." Yes. This was a document in my possession at the time we completed—by the time Senator Proxmire made that floor statement, yes.

* * *

[Page 34] Q. When did you talk to Mr. Dickenson? A. Dixon.

Q. Dixon. A. I had a number of conversations with him and the one that I recall at this time with Lee Dixon occurred after the release, some time down the road where I was doing other work in connection with NIMH funding. I was aware from the documents that I received from NSF that there was funding for Dr. Hutchinson by NIMH and I called Mr. Brackett, who is in the statistical section of NIH, they do the computer work, and asked him to do a computer check, and he told me over the phone—this is previous to the floor statement—that Dr. Hutchinson had had a large number of grant applications and that all had been turned down that had been evaluated, except for one which appeared to be when he was a graduate student back in the early '60s.

Q. Did you ever do anything to verify that statement by Mr. Brackett, that all of Dr. Hutchinson's applications, except one, had been turned down? A. Is this previous to April 18?

Q. Yes, previous to April 18, 1975. A. Yes, because I was confused. I spoke to the state of [Page 35] Michigan, Department of Mental Health, and I was trying to get a handle— I mean, there were just so many grants it appeared Dr. Hutchinson had. so many reapplications, that I was hoping that this would be a point of consoli-

dation of information, and they were to some extent. They said there was, in fact, a National Institute for Drug Abuse grant, and when Mr. Brackett said no, I believe that I called Congressional Liaison and I was informed by NIDA, and I can't remember who it is at all, that, in fact, there was no grant to Dr. Hutchinson, so I had three pieces of information: Michigan said yes, the computer said no, and then my check with NIDA said no again, and so I had not been able to verify that one, but I did try to verify it.

I did not speak with all the sub-agencies of NIH and NIMH from the computer run. I just assumed the computer run was accurate.

Q. How many times did you talk to Mr. Woodward on the telephone? A. Before April 18?

Q. For now, before April 18, 1975. A. I can't recall, but I believe it was twice.

Q. What were the approximate dates of those phone conversations? [Page 36] A. The first one was somewhere between the 9th and the 11th and perhaps the second one was around the 14th. My memory is vague on anything but an initial contact where we discussed the work of Dr. Hutchinson, but I have some recollection of a phone call, a second phone call in which again we talked about the nature of the material in terms of why they were funding, what they were trying to get out of this work.

Q. Did you take notes on those telephone conversations? A. Very briefly, because it was made clear to me that the material— I was going to be receiving the material.

Q. Do you know when those notes were destroyed? A. Yes. Approximately— ONR sent over a tremendous amount of material, as they promised, and that was one reason I did not take careful notes, they were promising all the material and they delivered. I mean, when it came into my office, I remember the secretary saying, "You've got some material here," and I mean it was two feet of material. Let me finish the answer, if I may. I went through much of it, not all of it, a lot of it was just really kind of equipment requests, just about everything was in there. Very importantly, though, as I remember—and I was told I was going to get this, too—was reprints of publications of Dr. Hutchinson which had appeared in [Page 37] the professional journals, but there was a big note on top and they said this again to me—this is why I must say there is a little confusion whether or not there was a Congressional Liaison person involved at one point in addition to Mr. Woodward. That's my honest—this is over a year ago in my recollection, that I would have to return this material, that they were giving me everything, they didn't want to xerox this amount of material and, as usual, they pointed out that my Senator is always concerned about wasteful public expenditure and I said, "I certainly agree; that's our job here to keep wasteful public expenditure to a minimum," and they said would it be all right if they sent me the original material and then, when I was through working with it, would I return it, and I said that was fine.

At the time that I decided to return it, which was at least a month later, as I remember it, I had this tremendous set of files on Hutchinson, notes, materials, reprints. I put all the ONR stuff back and put it in the mail—in fact, they sent somebody over to pick it up.

Q. Did you go through all those documents? A. I went through most of them. I did not go through all the ONR documents.

* * *

[Page 46] Q. After the news release was issued, were you personally contacted by any members of the news media? A. Yes.

Q. Approximately how many people contacted you after the news release? A. Not too many. Because I had informed Dr. Hutchinson ahead of time in a telephone conversation and read the text of the release, his answer was prepared and available to the news media before, and so the embargo ended up being broken and so the story really did not get the normal kind of coverage that a Golden Fleece does and it really was only several. I remember the day before the floor statement, Michigan—I don't remember who it was—represented a number of small papers and contacted [Page 47] me and I gave him the facts as were in the release and I don't remember anything about that conversation. That evening, on the evening of the 17th, I returned home from attending a Library of Congress concert with my wife and there was a message in the hands of the baby-sitter that I should contact an AP reporter and I didn't know the reporter, I called back, and they explained to me that a story had gone out across the wires because the Detroit office of AP had received Dr. Hutchinson's response to a nonexistent press release, as far as Detroit was concerned, and they called back to Washington and Washington did not have the story, and so they called the Press Secretary, who said I had worked on it, the baby-sitter took the message, the Detroit people obviously wanted to move on it, as I understand it from the reporter, so they told the AP reporter, I guess, to follow up, and finally they got hold

of Ron Tammen of Senator Proxmire's staff who gave them a very abbreviated version which did not contain most of the conclusions of the press release but was correct. As I explained to the reporter, there were no factual errors in the statement. It was not, in fact, precisely the press release and left out much of the material involving questions on issues such as duplication or fortune that did not appear in that AP release. The AP reporter [Page 48] explained that that is sort of the way it goes.

Then the next day I had a conversation with another AP reporter who said that he would try to give the full story and he called back to say he had been sorry, but it had been cycled twice and if there is no brand new news in it, they were constrained to just let it go, they couldn't put another story on the wire. That day, which is now Friday, the 18th, and the following Monday, the 21st, I have a vague recollection of perhaps a local reporter here or a small time trade publication or something—I really have no specific recollection—but I just have recollection that several additional reporters, a few, very few, contacted me. One thing I remember verifying was the fact that there had been a number of animals involved, other than monkeys, in the work, including a boa constrictor. That distinctly comes to mind, this reporter saying a boa constrictor, and I said, "Yes, he worked with inducing aggression and attack in boa constrictors." Now, after that, you begin to get newspaper people contacting Schwartz, Shuman mainly, Schwartz and Shuman and Carl Iffort, the Press Secretary, getting background on the total picture of Fleeces so that it is possible in the time between the 21st of April, 22nd of April, and Dr. Hutchinson's action against us, that several of us on the staff [Page 49] made passing reference to the work of Dr. Hutchinson. I am not certain even in my own case whether I ever

used the name Dr. Hutchinson or not. I would tend to doubt it because I was tending to summarize individual Fleeces and work and identification was important in the case of Dr. Hutchinson's Fleece because that was the link, it was over many different agencies and over many organizations that were involved that Dr. Hutchinson was associated with, but I don't believe I used his name after that. But to try to fully answer this question, later on I'm sure his work was referred to newspaper people over the phone by one or all of those three gentlemen.

Mr. Raywid: Let's take a recess.

(A short recess was taken.)

By Mr. Cavanaugh:

Q. Mr. Schwartz, let me give you Plaintiff's Exhibits 4, 5, 6, 10 and 11 and, if you would, I would like you to look those over and tell me if those are some of the documents you had prior to the April 18, 1975 news release? I will state for your information those are documents that we took out of the record of documents from Mr. Raywid's file this morning.

Mr. Raywid: Well, can I have the index back?

Mr. Cavanaugh: Sure.

[Page 50] Mr. Raywid: These are identified on this document list here by number.

The Witness: These don't contain my notations.

Mr. Raywid: He's asked you if these come from your files and I am advising you in addition to what he advised you, that here is an index of the files which you can refer to and I believe they came from this particular file (indicating).

The Witness: If I am being told they came from this particular file—

Mr. Raywid: Well, that's only to assist you in the interest of time, Mr. Schwartz, but I assume Mr. Cavanaugh wants a verification.

Mr. Cavanaugh: That's correct.

Mr. Raywid: If indeed these were documents in your possession and from your files.

The Witness: The answer is yes.

By Mr. Cavanaugh:

Q. Mr. Schwartz, you indicated that you had received a rather large quantity of documents before the press release was issued. Are those documents documents from the bulk of material you had before the press release was issued? A. Were they from the bulk of the material?

[Page 51) Q. In other words, are those documents you had before April 18, 1975 as opposed to documents that may have been acquired after April 18?

Mr. Raywid: Referring again specifically to Plaintiff's Exhibits 4, 5, 6, 10 and 11?

Mr. Cavanaugh: That's correct.

The Witness: Yes. Those were in my possession.

By Mr. Cavanaugh:

Q. Okay. Thank you.

Do you know whether or not Senator Proxmire or any member of his staff ever appeared on any radio or television show and discussed either Dr. Hutchinson or his work? A. I have no knowledge of that.

Q. Do you know whether or not Senator Proxmire was on the Mike Douglas show and during which appearance he discussed the Golden Fleece Awards?

Mr. Raywid: You mean as of today or—

Mr. Cavanaugh: As of today.

The Witness: As of today?

By Mr. Cavanaugh:

Q. When I say "as of today," I mean any show as of up to today and any knowledge you acquired at any time up to today. [Page 52] A. When I read the material—I don't know the term—associated with this case—

Mr. Raywid: The complaint?

The Witness: The complaint. Thank you.

—the complaint, I assume by Mr. Cavanaugh, I became aware of Senator Proxmire being on the Mike Douglas show.

By Mr. Cavanaugh:

Q. Do you know of any other radio or television shows the Senator appeared on during which there was a discussion of Dr. Hutchinson or his work? A. I know of none.

Q. Do you know of any staff person that was on such a radio or television program? A. I know of none.

Q. A while ago we were talking about the Office of Naval Research giving you a quantity of documents. Is that correct, sir? A. Yes.

Q. These are documents you received before April 18, 1975? A. Yes.

Q. Did you review those documents prior to preparing the news release? [Page 53] A. Not prior to the first draft.

Q. Did you review them between the first draft and the final draft?

Mr. Raywid: You are speaking of the material from ONR?

Mr. Cavanaugh: ONR.

The Witness: I believe that I received the bulk of that material on the day of preparation of the final draft.

By Mr. Cavanaugh:

Q. Did you review that material before the final draft was completed? A. I looked at some of it, but I had not completely digested it.

Q. Did ONR refuse to give you any documents that you sought? A. No.

Q. Did you also receive documents from NASA prior to your final draft of the news release? A. As I stated earlier, I received the progress report and I received the Keenan Master's thesis and I received the statement of justification for the work of Dr. Hutchinson.

Q. Did you seek any documents from NASA which NASA refused to give you? [Page 54] A. I sought complete cost information and I received oral information which appeared to be confused on the part of Mr. Allen.

Q. NASA did not refuse to give you any documents of any sort, did they? A. I do not believe that they were completely responsive to my asking for all cost information.

Q. Did you ever ask NASA if you could come over to review documents? A. No.

Q. Did you instead ask them to send the documents to you? Instead of going to NASA to look at the documents, you asked NASA to send the documents to you? A. What documents?

Q. The documents that you reviewed. A. I asked them to send me a copy of the Keenan material and the progress report, which they did send me.

Q. Did you receive documents from NSF prior to the final draft of the news release? A. Yes.

Q. What did you receive from NSF? A. I need to reference exhibits to give the complete list [Page 55] of it.

Q. Were they things such as progress reports? A. Progress reports.

Q. Grant proposals? A. Contracts, grant proposals, office visits, notes on office visits.

Q. The justification that you have asked them to prepare? A. Yes.

Q. Anything other than that you can recall? A. Yes. A sheet which summarized the total expenditure.

Q. Did NSF refuse to give you any documents that you sought? A. No.

Q. Did you request any documents from NIDA? A. NIDA is the correct pronunciation. I did not seek documents from NIDA prior to the news release.

Q. Have you sought documents from NIDA after the news release? A. In connection with Dr. Hutchinson or any documents?

Q. In connection with Dr. Hutchinson. A. No.

Q. Did you request any documents from NIMH prior to the [Page 56] news release pertaining to Dr. Hutchinson? A. Let me state it this way: In each case where I responded "No," where I asked NIDA if there was any grant and to send me the information, since they told me there was no information, nothing was sent to me, but I believe I misunderstood that question. I did ask for documentation. They said that they did not have any current grants which were operating. As best I can remember it, NIMH, National Institute of Mental Health, I contacted them. Other than the '62 one, I was not interested in that, so they did not send me any materials. My request to each agency was let me know what current operating or completed grants there are of Dr. Hutchinson and send me the materials. So that they did not send me materials because they claimed they had no current grants or past grants with him.

* * *

[Page 62] Q. Did that person from the Department of Mental Health you spoke to mention to you that the grants went to the Department [Page 63] of Mental Health or to a particular state hospital rather than directly to Dr. Hutchinson? A. I don't remember that because it's well understood that the funds in all grants do not go to individuals but go to the institution that the individual is associated with for the support of that work. That money is linked to the work of that individual but the funding, of course, goes to the institution.

Q. And you knew that before the April 14, 1975 telephone conversation? A. I've known it for all my academic career. I've known of the procedure.

* * *

[Page 65] Q. What was the purpose of mentioning Dr. Hutchinson by name? [Page 66] A. I saw no

other way of writing it. Here was a case of research over seven years, he was associated with Western Michigan, he was associated with Custer State, he was at Kalamazoo State, he also had another group in which some of his professional papers list the Philip Morris Corporation, there was this Institute for Behavior Research, and it was over a number of agencies, the link, the common link was Ronald Hutchinson and his work. There really was no other way to get the thing to hang together.

Q. Did you consider the possibility of mentioning or referring to the researcher simply as a Michigan researcher? A. Well, but his career—you know, he was at Southern Illinois and his first grant was while he was at Yale; he was—

Q. Did you mention the fact—

Mr. Raywid: Have you finished your response?

The Witness: No.

By Mr. Cavanaugh:

Q. I didn't mean to cut you off. Go ahead. A. I mean, I was aware that Dr. Hutchinson was funded while he was a student at Yale and that he worked for the Public Health Service and that he was at Anna State Hospital and then [Page 67] he was at Custer, at Southern Illinois, associated with Southern Illinois, so it spread geographically and across agencies and across institutions.

Q. Does your news release indicate that Dr. Hutchinson received funds from the Federal agencies while at Yale? A. No.

Q. Does it indicate that he received funds while at Southern Illinois? A. No.

Q. Or at Anna State Hospital? A. May I refer to the press release?

Mr. Raywid: Well, doesn't the press release speak for itself? You know whether it's in there or not, counsel. Do we have to spend time with the witness checking whether Illinois is mentioned in there?

Mr. Cavanaugh: Well, I am not sure if it's in there or not.

The Witness: I mean, no, it's not.

* * *

[Page 72] By Mr. Cavanaugh:

Q. Mr. Schwartz, will you tell me what investigation you made of Dr. Hutchinson's work prior to the issue of the news release? A. I don't wish to filibuster. I am going to be short and precise.

Q. I don't wish to make you become repetitious either if you already mentioned such things as reviewing documents, that's fine. If you can, tell me you did any investigation in addition to what you already mentioned. A. Well, I want to make it clear what I did do. What I did do was upon finding it, I read the two documents thoroughly, including Dr. Hutchinson's own progress report; I obtained a large number of NSF and ONR documents. The NSF ones were gone over in great detail. What was most useful in this was where [Page 73] I had communications, for example, in an office case of Dr. Hutchinson. I examined those documents because there I got the candid opinion of the work by the people at NSF and that was very useful to me. In addition, I spoke for a couple of hours, a total of a couple of hours, with Fred Stollnitz. The issues raised was the broad issue of types of funding, questions of measurement in social science with which I am very familiar. I checked with experts, an expert on this issue. I had telephone conversation or conversations—I'm not sure—with people

from ONR. I read articles prepared by Dr. Hutchinson which were supplied by ONR, progress reports, summaries of information of evaluations by the agencies involved, and I may have left a few items out, but that covers most of the material I looked into.

Q. Who was the expert you checked with? A. Dr. Stephen F. Maier. That one I know. M-a-i-e-r. Professor of Psychology at the University of Colorado, contributing editor to the Journal of Experimental Psychology, Animal Process Section.

Q. How did you consult with him? By telephone, letter or in person? A. Telephone.

[Page 74] Q. On how many occasions? A. With regard to Dr. Hutchinson?

Q. That's correct. A. Once.

Q. How long was that telephone conversation? A. The total telephone conversation was ten minutes.

Q. What did you tell Dr. Maier?- A. I informed him that I was looking into the work of Ronald R. Hutchinson and asked if he was familiar with the work. He said yes. I said, "This work is complicated, it's in a field that I have some knowledge of but not with great precision, I want to make sure I am not missing anything. This may be on the frontier. I mean, you work in a field similar to this man. You review work similar to his and you know of his work. Am I missing anything? Is this exciting, innovative work? Is it on the frontiers? Is it possible that my broad knowledge of priorities in Government and looking broadly at waste and public expenditure in my job with Senator Proxmire is blinding me to some very small piece of information that only you with your expertise would be aware of?" He said,

"No, this work is certainly not of the top notch frontier innovative work."

Q. Did he say anything else about Dr. Hutchinson's work? [Page 75] A. Yes. In the conversation he—I don't remember the exact words. He categorized it as "fair or average," that he was one of many workers in the vineyards and that—again, that the work was undistinguished.

Q. Did he say that it was basically solid work? A. He did not use the term "solid."

Q. What terms did he use in describing the work? A. As I say, the best I can remember it, the impression was that he was one of a number of researchers who were working in this kind of an area and that his work was not distinguished, and that it was, you know—he didn't scale it, but that it was fair, that it was okay.

Q. Did you ask Dr. Maier what documents he was referring to in judging Dr. Hutchinson's work? A. We talked a little about that. I made it clear that I had been reading material on him but I was judging him from the point of view of priorities in Government expenditures. He didn't know anything about Government priorities and the amount of money involved, it was just upon the knowledge he had as a major editor, a contributing editor of perhaps the leading journal in the field, and a man of international reputation. I was asking him to help me not to make a serious error. * * *

* * *

[Page 77] Q. Did you ever talk to any of his Project Officers about what they thought of Hutchinson's work? A. Yes. Bob Woodward and Fred Stollnitz.

Q. What did Woodward say? A. Woodward pretty much defended it along the lines that appeared in their

evaluation. The reference was to submarines, that the work was animals, but he was moving on to humans, that he was making progress in being able to empirically measure—and that was the emphasis on everyone's part—he was developing techniques for empirically measuring aggression.

Q. This statement about measuring aggression is something [Page 78] that was told to you before the news release? A. Oh, certainly.

Q. Did they mention to you that that was the point of his work, to measure aggression rather than determining the causes of aggression? A. As I remember the conversation, a lot of it had to do with what was implied by these measurements that Dr. Hutchinson was taking.

Q. Did anyone mention to you that Dr. Hutchinson had developed or perfected a method to measure aggression by measuring the electrical impulses in the jaw muscles? A. I knew that from reading the NASA documents.

Q. Did you discuss that with any of these agency project officers? A. I can't remember whether I specifically did or not.

Q. Did Woodward give you any— A. Oh, I will correct myself, since I read to Stollnitz—well, basically discussed the material that went into the floor statement, I did raise with him the question about people getting angry and jaw muscles, and I remember discussing the question of what is he measuring. Is he measuring electrical impulse? He is measuring reaction. What does that say, though? [Page 79] And as I remember it, Stollnitz in particular, I remember, admitted that's one of the great problems in psychology, you are measuring something precisely

but you are not sure what you are measuring. So I remember saying, in other words, what you are saying is something to the effect, as I remember it, that Dr. Hutchinson is measuring something more and more precisely but we are not sure exactly what it is, and he said, well you know, they are developing data and they are trying to make psychology come out of introspection and Freudian, and now they are trying to move in a direction of empirical research and measurement, and this is one of the directions they are going in and said that he was sorry that we had decided that this work was not of high value and that we were choosing to give it a Fleece.

Q. Did Stollnitz give you his personal opinion of the value of the work? A. I can't distinguish between Mr. Stollnitz's personal opinion and the official evaluation of the NSF.

Q. Well, did he give you any opinion as to their concept of what the value of the work was? A. Yes.

Q. Did he make a statement as flat as it's good work, it's average work, it's very good or it's very poor? [Page 80] A. He, in the conversation—and this was before I received the written thing—I had his documents in front of me and so I raised several questions. One, I raised the whole thing of drug testing and said that seemed to me to be, you know, not in NSF's bailiwick and he said, well, he kind of agreed but that was just part of what Dr. Hutchinson was doing, and I said some of the conclusions just seem very obvious and he said, well, it may seem that way but you need to verify in science, and I said, do you have to verify that animals which are hungry, all other things equal, tend to become aggressive more quickly, and he said, well, we are trying to measure that.

I viewed him as trying very hard to defend it and having some trouble. He said that while there was some—and I raised this notion of didn't this seem like it was replication after replication; he said, well, there were some elements of that and that Hutchinson had this precision of being an ex-engineer and there were doubts being raised about that in his work but they had agreed that there were doubts but that on balance, they wanted to move forward at least up to that point. Obviously the panel review thought—but it seemed to me he was acknowledging—I think he may have said it—that I was raising some valid points which, in fact, were in the documents [Page 81] later and, in particular, in one document which I already had in my possession.

Q. You were just referring to the duplication issue you discussed with him, whether or not some of this funding was duplication or overlapping? A. Replication, yes.

Q. Did you ask him whether or not the agency had looked into whether or not this was overlapping funding? A. Yes, that was implied in my last answer from the point of view of the projects in NSF. Was something being built or given priorities in Government, were we paying an awful lot of money considering what else we could have been doing, and I view that my job, and that's what Senator Proxmire would, too, to move through a series of experiments which appear to be very, very close except for replication at another species level or which appear to prove the obvious.

The other side of it was something I did quiz Fred Stollnitz on carefully, what kind of cooperation did he have, what kind of information exchange did he have with the other agencies, and he said, "I understand the problem you are raising, that the work is very close, it's very similar, I have discussed it," and he used the name

Bob Woodward, because I may have brought it up [Page 82] and he said, "I know the guy at ONR, we have discussed it and we are aware that the work is very close and very parallel," and I said, "How closely do you work?" He said, "We keep in contact." And as has traditionally been in my role of preparing hearings for the Senator and the Senator's legislative work and overseeing the public spending, I have constantly looked at this question of what information exchange, does the right hand of Government know what it's spending on, does the left hand of Government know what it's spending on, and do they ever come together to clap or, in other words, to really coordinate. There is great evidence. That is one of the things we have worked on in this office with agencies, in trying to work on where public funds are not wasted, that we don't have parallel work going on.

Q. Did Woodward ever get to the point of expressing an opinion of the value of Hutchinson's work, either his own opinion or the opinion of the agency? A. It's my belief that in a comment he made before—and my recollection is not as strong as with Stollnitz's—he did explain that men are in close quarters in submarines, problems of aggression, fighting, keeping men in these very difficult social situations in an equilibrium is something obviously the Navy is concerned with and that's the fundamental reason for [Page 83] funding Hutchinson's work. He could see some question that I was raising that he was moving from animals to humans but he felt that the research was valid.

* * *

[Page 87] By Mr. Cavanaugh:

Q. On page 2, the third paragraph from the bottom, it stated, "In fact, the good doctor has made a fortune from

his monkeys and in the process made a monkey out of the American taxpayer."

Can you tell me what that means, "The good doctor has made a fortune from his monkeys"?

Mr. Raywid: You mean the total phrase or only that part of the phrase or—

Mr. Cavanaugh: The entire sentence that I read.

[Page 88] Mr. Raywid: All right.

The Witness: It means that Dr. Hutchinson has achieved great status, income, power, control of researchers, chances to take vacations, expense accounts, based upon his work from monkeys, and obviously what it implies is that our evaluation of it, our subjective evaluation is that that is a wasteful spending of public funds and the American taxpayer is paying for something that he's not getting good dollar value for.

By Mr. Cavanaugh:

Q. You mention that the doctor made great income. When this news release was published, did you know what Dr. Hutchinson's income was? A. Approximately, yes.

Q. Approximately how much was that? A. $30,000 a year, which is in the top five percent of incomes in this country.

Q. How did you learn of that fact? A. Well, I had a vast array of documentation and in it it talks about percentage of principal investigators' time and all I have to do is multiply it. For example, if ten percent of his time is $29, you multiply that by ten and his salary is $29,000.

* * *

[Page 96] Q. Prior to issuance of this news release, did you receive any figures indicating how the grants were broken down, that is, how much were salaries, how much for overhead, how much for equipment? A. Yes.

Q. You had all that information before this news release? A. I had considerable—you used the word all this— I mean I had considerable information on it.

Q. Mr. Schwartz, did you have a telephone conversation with Dr. Hutchinson at about the time of this news release? A. Yes.

Q. How many conversations did you have with him? A. I recall two. One before the release and one after the release, after the floor statement of the release.

Q. Were those the only two times you ever talked to Hutchinson? A. To the best of my recollection, yes.

Q. Did you call him on both of those occasions? A. No. To the best of my recollection, I called him to read him the Fleece that was going to be going out concerning [Page 97] his work and then he called me on the 22nd of April.

Q. What was the substance of the discussion during the first telephone conversation? A. I began by explaining to him that we had been looking at his work and at the agencies that were funding him and that we were proposing to award the Golden Fleece and explained to him that I wanted him to be prepared, I wanted him to verify, make any corrections, and I wanted him also—two words I guess would be verification and notification. I was asking him to verify the facts. I read him the press release and asked him to let me know of errors in it and I explained to him that it would be going out on this date of—it would be mailed out—and I was going to mail him a copy, which I did, and explained to him

that it was put out ahead of any official statement by Senator Proxmire so that the press could be aware of it and I wanted him to be aware of it because he undoubtedly would be receiving telephone calls. I proceeded to read the release, the text of it, I had it in front of me, and I asked for his comments and I can't remember precisely what he said and I asked for errors, and one of the things he confirmed was that the NIDA grant proposal was not a proposal anymore, that the first year of funding had begun. He objected to the total [Page 98] tone of it and I said, "Well, you know, that's our subjective judgment. What are the errors in it?" And he said something to the effect of, "Well, the whole tone, the whole direction, I don't agree with, but, you know, you are giving me a chance, I will be preparing my own reply, I will have a reply," and I repeated, "Well, can you give me any other factual errors? I want this to be correct." Now I honestly can't remember if it was in this conversation or the next one, I remember this Rolland/Ronald. I'm a terrible speller. I don't know what my phonetic problem is, but there was a typo which had his name as "Rolland" rather than "Ronald" and I apoligized for it and I said—I don't know if it's at this conversation before the Fleece statement was made on the floor of the Senate or in his conversation of the 22nd, but I remember saying again, "Are there any other factual errors?" And he did not indicate any others.

He did not bring up any other specific issues.

Q. Was that the substance of that conversation? A. That's the substance of it as I recall it.

Q. What was the substance of the second conversation? A. He called me and he was agitated and angry and almost began by saying something to the effect of, you know, "What are you trying to do, what are you

trying, to get me?" That's [Page 99] certainly the tone. It was really a hostile one. I remember saying, "What's going on?" He knew the Fleece was coming out and he beat us to the punch. I mean, you know, he weakened our presentation by—because the newspaper people tend to write around the story they see first and I was thinking to myself, I should be angry at him, and then he began to explain that he was aware of the fact that I was checking into his patent situation and that I was raising questions about his possible criminal activities, and I really spent most of this time trying to reassure him that we were not out to get him, that I wasn't out to get him, Senator Proxmire wasn't out to get him. He said, "Why are you looking into all this," and he was very agitated, and if I may use the expression, aggressive on the phone. He said, "There's nothing wrong with this patent," and I said, "That's fine, we are thinking about checking that out," and he said, "But why are you looking into this audit business," and, you know, I pointed out that Senator Proxmire had legislative duties and oversight duties and what I was looking into was again what kind of information flows were going on, I wasn't between agencies between the right hand and the left hand of Government, and I assured him that I was not interested in pursuing any of the criminal activity and he [Page 100] said, "Well, believe me, I've been cleared of all that and why are you getting into it," and I said, "Well, that's fine. Then there will be no problem." And at the end, and I kind of remember this, he said something to the effect of, "Well, you know, you are not going to get me, I am not going to let this happen to me," and I assured him again that we were not trying to get him, and that's how I remember the conversation. I remember a tremendous amount of hostility which really took me back. He did tell me—I asked him, I said, "Where did you get this information?"

And he related to me that Fred Stollnitz of the NSF had called him, and I remember saying, "Well, why did he call you? I mean, he's obviously upset you and why did he call you?"

This was one Government official to another. He said, "Well, don't you think that he really should check with me and let me know what you people are looking into," and I said, "Well, I guess I can see his point." I remember that being part of the conversation. And that's the substance of it, as I remember.

Q. Did Hutchinson get selected to receive this news release and his funding agencies, the Golden Fleece Award, because he was involved in social science research and someone [Page 101] on the staff has a bias against social science research?

Mr. Raywid: That's not correct. He didn't get a Golden Fleece.

Mr. Cavanaugh: I think I corrected myself. If not, I certainly agree he did not, it was the agency, but was his work singled out because there was some bias against social science research?

The Witness: You are saying was his work singled out. The answer is no. We have singled out a great deal of work and research. My own work includes one that was placed in the Congressional Record, Senator Proxmire asked this question and placed the press release itself—in fact, I correct myself, it was actually Senator Magnuson because Senator Proxmire couldn't be there. Senator Magnuson placed it in there and we were talking about a North American Rockwell contract with the Office of Education, and Senator Magnuson was Chairman of the Labor HEW Appropriations Subcommittee and I did that work and it's true, the Office of Education does deal

with social research but the contract involved was the technical computer aspects. That was not a Fleece, but Senator Proxmire has stated that there are certain elements in research that he does not think highly of, there are certain elements that he thinks very highly of, but Dr. [Page 102] Hutchinson was not picked out as some sort of a vendetta against social sciences. Quite the opposite. Given that Senator Proxmire has stated his feeling that social science research, some of it is questionable, we have to work doubly hard to make sure that, in fact, the work is not, as the expression goes, a cheap shot but is carefully documented, because Senator Proxmire is on record as saying I object to certain types of social science and if you are going to use an example and his attitude toward certain types of social science research is going to be represented by that example, you better do a good job and he expects it and he demands it and I think he gets it.

By Mr. Cavanaugh:

Q. In discussing Dr. Hutchinson's case with any Federal agency, have you ever indicated that Senator Proxmire has an unfortunate personal bias against social sciences? A. That I don't think is a correct quote. In discussing with a number of Federal agencies, I pointed out that I disagreed with some of Senator Proxmire's attitudes toward social sciences and that was a personal comment, and I still disagree with some of his criticisms. I am a well trained individual who has an opinion of my own and I believe certainly I know I expressed to someone like Fred Stollnitz and Mike Weinberg that [Page 103] I don't agree with everything Senator Proxmire says. By and large, I do agree with my boss. I don't believe that's a correct quote. I don't know where you obtained it from, but I do remember discussing—I do it quite openly—that, for example—

Mr. Raywid: I think you have been fully responsive.

The Witness: Right.

Mr. Raywid: Let's not go on.

The Witness: Right.

* * *

[Page 107] By Mr. Cavanaugh:

Q. How much time did you spend investigating Dr. Hutchinson before the news release? A. Total time, about a week total time.

Q. Was that a 40-hour week? A. 40 hour.

Q. Or was it doing that and doing other things? A. No. It was over a period of four weeks, approximately. I mean, one work week of total time devoted to Hutchinson.

Mr. Raywid: Extending over a four-week period?

The Witness: Yes.

* * *

[Page 110] By Mr. Cavanaugh:

Q. Have you ever said directly to any of these agencies or said to them by implication that you or Senator Proxmire desired that Hutchinson's funding be cut or cut off all together?

Mr. Raywid: Well, isn't that almost a verbatim question that you asked before?

Mr. Cavanaugh: Well, I think I limited it to an agency before and to save the trouble of going through each agency, I thought I would ask it in the broad sense.

Mr. Raywid: All right.

The Witness: That goes against office policy and I have never directly told any agency what to do on any grant, Hutchinson's or any others that were pending.

By Mr. Cavanaugh:

Q. Now, I don't wish to limit it just to what you are telling them to do, but have you ever said anything to them that conveyed the idea to them that you or Senator Proxmire desired the funding cut off?

Mr. Raywid: I believe there was a lengthy response to that before. He indicated that by the nature of the speech and press release, that the Senator was opposed to this.

[Page 111] Mr. Cavanaugh: I am excluding the press release, though.

The Witness: Well, he made a floor statement.

By Mr. Cavanaugh:

Q. Excluding the floor statement. I am talking about your conversations with these persons from the agencies. A. Could you repeat that? Did I or Senator Proxmire?

Q. No. Have you ever talked to anyone at the agency and expressed to them the idea—and I was not limiting it to you telling them but rather expressing the idea to them—that you or Senator Proxmire desired Hutchinson's funding cut? A. Except insofar as the context of the floor statement and release, you know, that stands by itself, I did not try to influence. It's not my job, it's not the policy of the office and I did not.

Q. NIDA was not one of the agencies that was Fleeced, is that correct? A. That's correct.

Q. Do you recall ever talking to an official of NIDA and saying something to the effect—after learning that they were still funding Dr. Hutchinson— "You know, you did not get the Golden Fleece this time around"? A. No. I remember discussing with Dr. Pollin that—of [Page

112] course, I had not been able to verify it, that they had not received the Golden Fleece for it. I did say that to him. That was a factual, accurate statement. And, in fact, in the conversation I distinctly remember, because I have had a number of conversations with Dr. Pollin, that I stated that I understood why NIDA was funding this work of Hutchinson, because it was strictly drug testing and Hutchinson had been working on developing a systematic way of evaluating drugs, and we then went into some discussion of what I discussed with a number of agency officials about really what were you measuring, and Dr. Pollin agreed that there really is a problem of interpreting what appears to be precise data.

Q. When was this telephone conversation? Was it a telephone conversation? A. I have had face-to-face conversations with Pollin and I have had telephone conversations. I cannot recall whether the conversation on Hutchinson occurred by telephone or in person.

* * *

[Page 113] Q. Can you tell me the context in which your statement arose, the statement something to the effect, "You didn't get the Golden Fleece this time"? A. I deny I made that statement.

Q. Okay. A. I mean, as I remember it, the statement was, you know, and as I remember the context, it was as a joke, because I had a number of friendly conversations. His agency was Fleeced or about to be Fleeced, so that in that context there is an irony, saying, "You missed the Golden Fleece for Hutchinson's work but we disagree with some of your other work," and, you know, they were in the process or had received the Golden Fleece. Can I add to my last answer?

Mr. Raywid: Well, if you think it's unclear or necessary, but we don't want to unduly prolong this.

* * *

EXCERPTS FROM DEPOSITION OF WILLIAM PROXMIRE, SEPTEMBER 17, 1976, U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

* * *

[Page 5] Thereupon,

SENATOR WILLIAM PROXMIRE

a defendant, was called for examination by counsel for the plaintiff and, after having first been duly sworn by the notary, was examined and testified as follows:

Examination by Counsel for Plaintiff

By Mr. Cavanaugh:

Q. Senator, could you explain what the Golden Fleece Award is, what it consists of. A. The Golden Fleece Award is an award that we give each month, and have since March of 1975, to the agency which has engaged in what we consider to be, or I consider to be, the most outrageous example of wasteful spending in the preceding month. The purpose of the Golden Fleece Award is to dramatize wasteful, extravagant spending and try to discourage it. We feel that this is one way of using a dramatization of a specific wasteful expenditure to do more than simply generalize against waste in Government.

Q. What is actually awarded for the Golden Fleece Award? Is anything sent to the agency? A. No, nothing is sent to the agency.

Q. What does it consist of? [Page 6] A. It consists of an announcement that in the preceding month, in our judgment, my judgment, the action of a particular agency

in spending funds in a certain way was an example of wasteful spending.

Q. Is something inserted in the Congressional Record dealing with the Golden Fleece Award? A. In most cases, yes. I don't know if in every case I have done so, but in most cases.

Q. In addition, is there a news release released? A. That is correct.

Q. What is the purpose of the news release? A. The purpose of the news release really has a clear legislative purpose in several ways. One purpose of it, of course, is to inform not only the public but to inform my colleagues. I have found in 19 years in the Senate that very often a statement on the floor of the Senate or something that appears in the Congressional Record misses the attention of most members of the Senate, and virtually all members of the House, because they don't read the Congressional Record. If they are handed a news release, or something, that is going to call it to their attention, whereas a simple statement on the floor of the Senate will not have the effect of calling it expressly [Page 7] and specifically to the attention of the agencies involved so that they know about this and so that the public knows about it. It seems to me it accomplishes the desirable purpose of discouraging not only wasteful spending in general but this particular kind of activity which I think is wasteful.

Q. Was the speech dealing with Dr. Ronald Hutchinson and the Golden Fleece Award actually read on the floor of the Senate or later inserted in the record? A. I'm not absolutely certain but, to the best of my knowledge, it was delivered on the floor of the Senate, and I say that because there was a difference between the record

transcription and what was actually carried in the release. Additional words were added. There was nothing in the release that was not said on the floor of the Senate but there was an additional phrase, I believe, that I added on the floor that sounded like a typical ad-lib that I might make under the occasion, so that would suggest to me that it was delivered on the floor of the Senate, and in a number of cases I have read these releases into the record.

Q. Senator, did you consider the news release to ridicule Dr. Hutchinson? A. Absolutely not. No, indeed. The purpose of this release [Page 8] was to discourage wasteful spending and in no sense was it meant to ridicule or demean Dr. Hutchinson.

Q. Did you consider the news release in part at least to be written in a humorous style? A. Not primarily. I think that there might have been an element of humor that some would see in it, but I think most people would consider it a serious criticism of an activity that I would regard as wasteful and not justified with sufficient priority, not having the merit of deserving the public funds that were devoted to it.

Q. I was thinking of such sentences as, "The funding of this nonsense make me almost angry enought to scream and kick or even clench my jaw."

Was that intended to be in a humorous vein?

Mr. Raywid: Let's have the witness refer to the particular sentence that you are looking at.

Mr. Cavanaugh: I am looking at page 2, the fourth paragraph from the bottom.

The Witness: The question is was this meant to be a humorous reference? I suppose that particular sentence

might be regarded as the reaction of somebody who was both angry and perhaps thought there was an element of humor involved.

[Page 9] By Mr. Cavanaugh:

Q. Was the humor in the news release inserted to obtain broader news release or broader news coverage?

Mr. Raywid: Are you referring specifically to that phrase? The Senator has already said that he does not regard the entire tone of the news release to be humorous. Now, to what humor are you making reference?

Mr. Cavanaugh: Whatever humor that the Senator may see in it. The last reference we had was to the sentence that I read, but—

The Witness: Well, let me respond in this way: I think that this release is overwhelmingly a serious release. There is an element of humor in it, I think that that may be the case, and I think that the particular phrase to which you refer may be one of the few elements that some people might construe as humorous, although I think it can also be construed as an assertion of outrage and of anger.

By Mr. Cavanaugh:

Q. How was it intended as an assertion of outrage and anger or humor?

Mr. Raywid: What are you referring to?

Mr. Cavanaugh: The particular phrase we are—

[Page 10] The Witness: The phrase, "The funding of this nonsense makes me almost angry enough to scream and kick or even clench my jaw," I think it was intended perhaps in both ways, but let me repeat that this is one short sentence out of a news release that's 20 or 30 times

longer than that, most of the rest of which is, of course, factual and relates to the reason why we thought this was a wasteful project.

By Mr. Cavanaugh:

Q. Why was Dr. Hutchinson named by name in the news release as opposed to being referred to as a researcher or some other general term? A. Simply because we felt it was desirable to be as specific and definite in this release as we could. I had never heard of Dr. Hutchinson before, I had no association with him and had no reason to have any particular feeling about Dr. Hutchinson.

Q. I think you indicated you felt that it was necessary or desirable to name him by name? A. I think whenever you can be specific and not generalize in a release of this kind so that people know what you are talking about, it may be useful. This happened to be the researcher who was involved and I think it was useful to point out that he [Page 11] received funds not from just one agency. This was a little different than some of the Golden Fleeces because in the past, there was simply one agency involved; in this case, there was three, and he had received funding from each of these agencies to engage in this particular kind of research, so that for that reason, it seemed to me that the central figure in this operation was Dr. Hutchinson, and for that reason, it was necessary, in view of the fact we weren't simply directing the Fleece at one agency, to point out that he was the central figure involved.

Q. In news releases dealing with some of the other Golden Fleece Awards, the individual researchers have not been named; is that correct, Senator? A. In some of them, that's correct, yes.

Q. What is the reason for not naming those individual researchers? A. I don't think there is any particular

reason except that in those particular releases, I think in every case or almost every case, that there was only a single agency involved, and the Fleece, as I say, is directed at the agency, it's not directed to the person who receives it. The criticism is directed at the agency, not at the person who receives it.

Q. Senator Proxmire, if I may, I would like to refer to the [Page 12] news release again. The last sentence in the first paragraph on page 1 reads, "From the findings of these studies, it is clear that the Government"— A. I'm sorry. I want to make sure I am following you.

Q. The first paragraph, the last sentence. A. Right.

Q. "From the findings of these studies, it is clear that the Government paid a half a million dollars to find out that anger, stopping smoking, and loud noises produce jaw clenching in people."

Did you consider that a fair summary or portrayal of Dr. Hutchinson's work? A. It's one sentence in a release that, of course, contains a great deal of other material. It is not the lead sentence but it's one sentence in the lead paragraph. I think it is fair to say that this sentence indicates what I construed to be the purpose of the study by Dr. Hutchinson inasmuch as the only reason really to spend a great deal of money studying the reaction of animals was in order to facilitate an understanding of human behavior and, as this sentence says, to find out that anger, stopping smoking, and loud noises produce jaw clenching in people.

Q. Was it your understanding that that was the purpose of [Page 13] Dr. Hutchinson's work, or the result? A. That seemed to be the principal result, yes.

Q. Did you reach that conclusion from your review of documents and facts or was that based upon information or belief given to you by someone else? A. Well, it was primarily reached by the work that had been done by Mr. Schwartz, Morton Schwartz of my staff, supervised by Howard Shuman, and I arrived at that conclusion not simply because two people came to that conclusion, but because I have, I think, reason to rely on the judgment of both of these men and the hard work of both of these men. Mr. Schwartz is a well qualified economist who has done graduate work in economics, who has taught economics, and who has done good work for me. Mr. Shuman, who supervised him, is a man who has several degrees, has taught economics for five years, has served the one outstanding economist who's been in the Senate in the last century, Paul Douglas, former President of the American Economic Association, and his top man for six years, and I felt that these two men with their background and with their competence and with their capability in social science, not in economics, in this field, would be in a position to make this judgment and I relied largely on their judgment.

[Page 14] Q. Do either of these men have any formal training or experience in the field of psychological research or the field that Dr. Hutchinson was working in? A. Neither of these men have had formal training in this particular field, but both of these men have dealt as very intelligent and discriminating laymen with psychology and with the social sciences generally as well as with their specialty in economics, which, as you know, is a social science.

Q. Senator, did you yourself review any of the documents from the various Federal agencies prior to writing this news release? A. I did not. I did not write the news release.

Q. Prior to the news release being written, did you review any of those documents personally? A. No, I did not.

Q. In the third paragraph, Senator, it states, "All this money was given to Dr. Roland R. Hutchinson of Kalamazoo State Hospital in Michigan." A. Let me just say that the one error in this release was the name. In the release, it's "Rolland Hutchinson." It should be—you are correct— "Ronald," but the release says "Rolland."

Q. Were you aware when this news release was released that [Page 15] the funds actually went to various agencies of the state of Michigan? A. I recognize that when grants are provided, they are provided technically to an institution but that, in effect, the control of that money, the direction of the money, the discretion with which that money is allotted and outlaid and spent is within the control of an individual. That individual in this case I was convinced was Dr. Hutchinson, which I understand still to be the case. Of course he would work with an institution, in this case Kalamazoo State Hospital, I guess, in other cases involving this $500,000 with one or two other institutions, but he was, as I say, the central figure, he was the one who controlled the funds, who scheduled the experiments who had the discretion to know how the funds would be used.

* * *

[Page 17] Can you tell me what was meant by the phrase, "The good doctor has made a fortune from his monkeys"? A. Well, Dr. Hutchinson in engaging in this project had, as we have pointed out in the release, some $500,000 under his direction and control. Out of that, he was paid a salary of some $30,000 and it was clear to me that any person who would be able to command that kind of authority and prestige and influence would be in a position to do very well, certainly as compared with most Americans whose incomes would be far lower than that and whose opportunity to influence the expenditure of funds would be far less. So I thought that statement, "He has made a fortune from his monkeys" was a reasonable conclusion.

Q. Senator, based upon the salary and the power of say a middle level Government official or a Congressman, would you similarly say that they have made a fortune? A. I think certainly that any reasonably prudent person—of course, as you know, Dr. Hutchinson is a relatively young man, I am 60 years old, he is substantially younger than that—any person making that kind of money at that age who is prudent and careful, he would certainly be able to make a fortune.

* * *

[Page 21] The Witness: Well, I repeat what I said, that I think it's a reasonable conclusion, a reasonable inference from all of the facts that I indicated, that he's making about $30,000 a year, that he has command over half a million dollars to spend as he wishes at his discretion, in his own way, under his own control.

By Mr. Cavanaugh:

Q. Did you mean to imply any sort of wrongdoing or misappropriation of funds by that statement? A. No.

Q. Were you aware that the agencies that funded his work had control, at least the right of approval, over expenditures that he made? A. Yes.

* * *

[Page 26] Q. Before the news release was issued, did you review any of the evaluations of Dr. Hutchinson's

work prepared by officials at NSF, NIDA, or the Office of Naval Research? A. No.

Q. Did anyone report to you what those evaluations were, if any? A. Mr. Schwartz reported to me on the basis of his review of Mr. Hutchinson's work, the time he had spent on it, the value of it, and indicated his judgment, which I consider to be a reasonably good judgment, based on the time he spent and the people he discussed this work with.

Q. Did Mr. Schwartz or anyone else on your staff report to you whether or not the evaluations prepared by the officials at NSF, NIDA, NASA, or the Office of Naval Research referred to Dr. Hutchinson's work as good or excellent or solid or useful or important? A. No, they did not. Frankly, my function as a legislator [Page 27] is to be critical of these agencies and not to accept their evaluation. If they had said that a particular person were incompetent, obviously they wouldn't fund their research. The assumption, if they are going to provide funding, is that they are going to give them a high rating; otherwise they look bad, and there is no way they can justify what they have done. So I would have to refuse to accept their judgment and rely on the independent inquiry of the competent people on my staff who are investigating this rather than the judgment of people who are in a position to where they pretty much have to be able to defend their expenditure of hundreds of thousands of dollars of the public money.

Q. Did you even ask Mr. Schwartz what the evaluations were by the officials at NSF, NIDA, ONR or NASA? A. No, I didn't, and, as I say, I think it would have been not worthwhile information as far as I was concerned because I would be astonished if they had indicated that the person they were awarding this much money to was

regarded as anything but highly competent. I'm sure they would have said that and I think I would have been remiss on my part to accept that judgment if that had been the case, so I think whatever their judgment was, I had to go beyond it and I did.

* * *

[Page 32] Q. What happened to the news release after it was a final draft in your office? A. Well, we have a procedure on news releases in which they are sent out so that they will be available to the press at approximately the time that the statement is made on the [Page 33] floor of the Senate, or that it's put in the record, and on that basis, I would assume this is handled like others and I'm sure that was the case. But after the release was finished, it was then typed up and it was sent down to the Senate in the basement of this building, the first floor, where the news releases from various Senators are handled in a particular way, according to Senate rules.

Q. Do you know when the news release left your office to go to the Senate—is it the Senate Service Department? A. That sounds like it. It could be.

Q. Do you know when the news release left your office to go to the Senate Service Department? A. I don't know because, of course, I can't remember what happened 18 months ago or more, but my guess is that it probably would have gone about Tuesday or Wednesday of that week, in other words, on the 15th or 16th of April, if it were going to be available—possibly a day earlier—if it were going to be available by 6:30 a.m. on April 18. You have to have a lag of two or three days before a release comes out in order for it to be distributed and available to the papers so they can use it at the time, and the other media.

* * *

[Page 37] Q. Why do you send your Fleece announcements to the general distribution list rather than the Wisconsin distribution list? A. Well, because this is a matter, as I say, of the purpose, the purpose of informing my colleagues in the Senate. Anything I send to Wisconsin, Senator Nelson and the Wisconsin delegation may know about it, but other congressmen and Senators don't. If I send this to the general distribution list, it may appear in the Washington Post, in the New York Times, as some of these releases on the Fleece have done; it may appear on television, as often happens, and then they see it and they get an understanding of the problem they otherwise wouldn't get.

Q. After this news— A. And the agency here sees it. If I just send it out to Wisconsin, these three agencies wouldn't realize the public awareness of this particular carelessness on their part.

Q. What do you hope that the news releases will accomplish? A. Exactly what I have just said. The awareness on the part of the agencies that there is a public protest, a publicly announced outrage at their expenditures, it seems to me likely to have a salutary effect. Also, I think on the affect of other members of Congress it's desirable in the way we are going to [Page 38] handle the budgets of these agencies when they come before us, the kind of inquiry we make because they will be aware that there are particular instances and they can cite them far more effectively than you can say, "Well, you have been wasting money," "Where? Where?" "How do you cut down their spending?" Half a million dollars isn't peanuts, it's a lot of money, and they should be able to justify and explain that. I think as my colleagues and the public becomes aware of it, there is a much greater sensitivity on the part of these agencies to do wasteful spending and a greater care and concern and likelihood that they are going to be concerned about priorities.

Q. Is it your hope that the news releases will result in a change in the funding pattern of the agencies? A. I am not sure what you mean by "funding patterns of the agencies." It seems to me that it is designed to make sure that they are more sensitive. There is going to be a public concern and a congressional concern about how they spend their money and they better be able to justify it. If they can't justify it, then they should spend their money in areas that are justifiable.

Q. Was it your hope in issuing the Hutchinson news release that it would result in the agencies cutting off funding? [Page 39] A. Well, it was my hope that the funding for this particular project would be eliminated or reduced. I didn't have any particular concern when this release was issued with Mr. Hutchinson himself. If he had other projects that could be justified, then of course there is no reason why they shouldn't be funded, but I think this particular study it seemed to me was a waste of money.

* * *

[Page 64] Q. Have you ever had contact with any employee or agent of the Internal Revenue Service regarding Dr. Hutchinson or his work? A. I don't recall any.

Q. Do you have any records that would disclose any contact with the FBI or the IRS if there was such a contact? A. Yes. It's possible, as I say, that Mr. Schwartz had made inquiry, he, after all, had done a lot of good work on this and found basis for further investigation. It's possible that he on my behalf had made this investigation, but I didn't make it personally.

Q. Did you personally have contact with any agency of the state of Michigan regarding Dr. Hutchinson or his work? A. Not personally, no.

Q. Do you know of any person on your staff, other than perhaps Mr. Shuman and Mr. Schwartz, who had contact with any agency of the state of Michigan? A. No. I would be surprised if any other member of my staff had done that. As I said, Mr. Tammen wrote the release [Page 65] to which you referred earlier, the one you just showed me. Anyway, that's the only activity by other members of the staff with respect to this case.

Mr. Cavanaugh: Senator, thank you very much for your time.

The Witness: Thank you.

Mr. Raywid: I have some questions.

Examination by Counsel for Defendants

By Mr. Raywid:

Q. First of all, Senator, the questions addressed to you have repeatedly referred to a press release. Is the press release and the draft of the press release any different from the speech which is delivered on the floor? I mean, is it the same— A. It's the same press release with the exception of some phrases that were deleted from the speech when it was given on the floor, such as, "Senator William Proxmire announced on Friday. . ." Of course, that would be deleted, I wouldn't say that. I would start with the part that's in quotes and the press release is a faithful and accurate reflection of what I said, if you delete the part that is not in quotations, but virtually the whole press release is in quotations and I think there was [Page 66] one short phrase added somewhere in

the press release with respect to my reaction that this is outrageous or something of that kind that I ad-libbed in. Except for that, it's a faithful and accurate reflection of what was said on the floor.

Q. You said there was an added remark in the press release. Did you mean— A. I meant to say there was an added remark on the floor of the Senate that appears in the Congressional Record that is not in the press release, that's correct.

Q. In the normal preparation of documents for both the press release and speech, is there only one document prepared for your use? In other words, would there be a different document labeled "Speech" and a different document labeled "Press Release"? A. Very often there is. Very often I will give a speech of 15 minutes or maybe longer and it will be summarized in a release that will be considerably shorter than that, maybe a release that would take a minute and a half or two minutes to read. In this particular case, however, that was not true. In this case, it was almost a word for word reflection of everything that was said, the only exception, as I said, being the deletion of identifying words in the press release as "Senator William Proxmire announced on Friday. . ." and "The Wisconsin [Page 67] Senator said . . ." and then the addition of four words on the floor of the Senate that don't appear in the press release.

Q. Are you familiar with the term "oversight function"? A. I'm very familiar with it and I think oversight, of course, is an extremely important responsibility for the Congress. It's been a neglected responsibility in my view, but it's one that we are constantly urged to engage in and we do. Oversight function refers to, of course, seeing that the money that is appropriated is well spent and that the laws that we actually pass are actually

enforced, and we often have hearings to determine whether this is the case. We follow up with letters, we follow up with specific criticisms, and I think that the Fleece in this case is a good example of oversight function and responsibility for the Congress and for the Senate.

In this case, I was concerned with the expenditure of these agencies that under the jurisdiction of the subcommittee of which I am the chairman, I wanted to follow up on by seeing that the money was spent in an economical and prudent way.

Q. Do these expenditures mentioned in that press release fall within your particular purview of responsibilities? A. They fall more clearly in my responsibility than any one of the other 99 members of the Senate. * * *

* * *

By Mr. Cavanaugh:

[Page 70] Q. You were asked as to whether you actually delivered this particular speech on April 18, 1975 or merely inserted it in the record. You have given us your view that you believe that you read it, although you have no specific recollection, and you have given the reasons for that. If it were inserted in the record, would that require your presence in attendance at the Senate? A. It would indeed. There is a rule now in the Senate that has been in effect for three or four years that the only way that anything gets included in the Congressional Record is either it is spoken on the floor by the Senator involved or it is handed by him personally at the desk and he has to be recognized by the clerks at the desk who, of course, know all the Senators and will not accept this from an assistant staff member or anyone else on behalf of the Senator. It has to be the Senator himself

who offers it, so that there isn't any question in this case that in the event I didn't deliver it as a speech on the floor, and I think there is every reason to expect that I did, but I would have given it personally directly to the clerk at the desk to be printed in the record.

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EXCERPTS FROM DEPOSITION OF RONALD R. HUTCHINSON, SEPTEMBER 21 AND 22, 1976, U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

* * *

[Page 42] Q. Now, what was the occasion of your terminating your employment with the State? A. What was the occasion?

Q. Yes, why did you terminate your employment with the State? A. The research department function was terminated by the State Hospital.

Q. For what reasons, if you know? A. We were told that it was for administrative efficiency.

Q. When were you given that notice? A. Each of the employees was notified eight days before.

Q. Eight days before June 30th, 1975? A. Approximately eight days.

Q. Had you been given any prior notice? A. I had received several memoranda from the Superintendent at an earlier point in time, saying that it was his intention to terminate the research department.

Q. Was that the decision of the Superintendent? A. To the best of my knowledge.

Q. What is the earliest notice that you received? A. No other substantive notice ever occurred.

Q. Well, did you have any understanding prior to that time that there was supposed to be some fixed point of termination? A. I told you about the memoranda that I received from the [Page 43] Superintendent which occurred at an earlier point of time, stating his intention to terminate. I or other employees were never contacted by the Personnel Department or the other appropriate body of the institution.

Q. What was the earliest notice on your part, or at least the possibility existed that you were going to terminate on mid-1975? A. The memorandum from the Superintendent in December of 1974.

Q. What was the reason announced, or what was that notice? A. That was a notice of his intention to terminate the research department.

Q. What was the announced reason at that time? A. I'm confused. I thought that was the same question you asked a minute ago.

Q. You announced as early as December of 1974 that he was going to close the research department, is that correct? A. That's correct.

Q. Now, was there any reason given at that time? A. Well, I'd have to check the memorandum again, but I believe—I believe that the administrative efficiency or the reduction of funds, budgetary considerations, was listed. No, that's not my belief. I don't believe there was a reason given in that memorandum. * * *

* * *

[Page 210] Q. Did you have any objection to the AP story which carried your comments?

Mr. Cavanaugh: Do you know which article is being referred to now?

The Witness: I would like to see the AP version.

Q. (Mr. Raywid) Here's one from the Battle Creek, Michigan, Inquirer News, and it states, it has an AP line. If I am not mistaken, the particular captions are written by the newspapers and they are free to cut from the AP, but that may or may not be an accurate summarization, but I ask you to refer to that particular article and see if that is one which causes you any particular offense. A. You want to know about my feelings with regard to their coverage of my statements or—

Q. No, the entire statement. A. Oh, this entire article. The entire article, am I offended by it? On, yes, several ways. Taking the first paragraph, Senator William Proxmire says that he has awarded his Golden Fleece of the Month prize to a research project at the Kalamazoo State Hospital in Michigan to study jaw-clenching. Well, this is the kind of translation which was bound to happen, given the nature [Page 211] of the press release which the Senator issued. In fact, the Senator was slightly more conscious than that, he gave his Fleece Award to the agencies, but here we have already a transgression over towards my project and me, so that the—so that it's a personal ad hominen address, at least implied by this article.

Now, let's see the second paragraph, that seems to be fairly straight copy from the article.

Now, see, paragraph three is very interesting because I don't recall that in the Senator's press release there was any mention of wasps and boa constrictors. Where would they have gotten— Where would they have gotten the description of wasps and boa constrictors and stuff?

Q. Do you take any objection to that? A. Apparently off the record he has stated—made further statements.

Q. Well, I am not asking you to speculate how this got in there, what I am asking you: Does that cause you— A. It's inaccurate. I did not begin my work by studying wasps.

Q. Do you say it causes you any offense? A. Yes, it's inaccurate. It's offensive because it's inaccurate. I did not work my way through boa constrictors, rats and monkeys.

[Page 212] Q. Did you conduct jaw-clenching experiments with all of those animals? A. In fact, that's true. Another thing that's—oh, wait before we leave that. Is it correct that I conducted jaw-clenching experiments with all those animals? That's incorrect.

Q. Which of those animals did you not conduct any experiments with? A. You see, there's no jaw-clenching mentioned here. You are inferring jaw-clenching mentioned. He said Hutchinson began by studying wasps, worked his way through boa constrictors, rats and monkeys, and finally, human beings. There is no description of the responses being studied there, so that can't be what offends me. What I was going to tell you, what offends me, another thing that offends me about this paragraph is that he gives me credit apparently for the principal direction with one species which I was not principally responsible for studying. He fails to credit a colleague of mine, Dr. Nathan Aswrin (sp) who was the principal director of the study of boa constrictors.

Q. Is that the part that gives you offense? A. That's an additional offense. I talked about two, now.

Q. Would that cause you any damage or injury? A. Absolutely.

[Page 213] Q. In what respect? A. To the extent that anyone can think, particularly Dr. Aswrin, that I may have made any input to this entire press coverage which unfairly characterizes his role in this study. It's a very serious error.

Q. Now, were all of the— Did you participate in experiments with all of those animals mentioned? A. That's correct.

Q. And is the sequence out of order? A. The sequence, as I said, is out of order.

Q. What would be the proper sequence? A. The proper sequence might be, alluding again to the fact that boa constrictors were principally investigated by Dr. Aswrin—

Q. You participated in boa constrictors? A. That's correct. Boa constrictors, wasps, monkeys, rats, humans, might be a more proper description of sequence.

Q. Would you have any objection if that—if that sequence had been mentioned, and then giving appropriate credit to Dr. Aswrin? A. Yes. First—of those things that I mentioned in this paragraph, by far the most offensive element is the failure to identify the principal investigator. The sequence is a small error but it's offensive to me.

Q. But if the sequence were correct and Dr. Aswrin were [Page 214] mentioned, you would have no problem with it? A. That— That would be a helpful adjustment, yes.

Q. All right. Anything else in that article? A. Let me ask, maybe it's inappropriate, but it didn't come from the press release. Where did this statement come?

Q. Well, it is inappropriate. Would you go on? A. Proxmire said that some of his conclusions were that when monkeys get mad, they clench their jaws and that drunken monkeys don't react as fast as sober monkeys. Well, that's really a travesty of truth.

Q. And what would be a correct statement of that? A. Well, let's take some of the elements of it. First of all, the Senator here is not quoted but described to have stated, which he, in fact, did in his press release, that monkeys clench their jaws when they get mad. Now, that is inaccurate in the following way: We have not studied jaw-clenching in monkeys, so that it's an inaccurate reportage of what was investigated with regard to monkeys. We certainly have not investigated monkeys getting mad in the sense that we don't measure madness. There is nothing— There is no measurement for madness that I feel confident to perform, and I certainly would not speak to my colleagues or to my children or neighbors in that fashion, okay?

Q. I don't understand what you mean. Are you objecting to [Page 215] the use of the word "mad"? A. That's one of my objections. The Senator states that I concluded, let's see, Proxmire says that some of his conclusions—that I made conclusions that monkeys, when monkeys get mad they clench their jaws. Now, I told you first of all that technically I did not measure jaw-clenching in monkeys, so I clearly couldn't have made that conclusion. The second thing I am telling you is that it's not an insignificant point that we did not measure madness. We did not measure monkeys getting mad.

Q. Well, are you objecting to the use of the word "mad" rather than aggression? A. You are on the right idea, but let me turn you around slightly. I measure objective events, I do not measure unmeasurables.

Q. Well, your studies— A. Mad is an inferred internal state, a psychic event, a wisp of wind, okay?

Q. Can you understand that a layman might use "mad" and "aggression" synonomously? A. I can understand that laymen do that all the time, but when you are going to describe accurately what my conclusions are and then infer in any way that I make conclusions which use such colloquialisms and such unscientific terms, I consider that grossly in error.

[Page 216] Q. All right. A. And a disservice.

Q. So you are offended by the use of colloquialisms in the description of your work, and do I understand that—have you conducted any experiments using monkeys, squirrel monkeys and measuring aggression through the jaw-clenching by squirrel monkeys? A. We measure— We measure biting on a hose. We measure— We measure the—ah, closure of the mandible on the hose.

Q. So what is the inaccuracy in the statement? A. Well, I told you that the statement here is made of jaw-clenching. Now, you see, jaw-clenching is a term that I have used to refer to the behavior, the processes that I have measured with humans.

Q. Well, if you would make the correction that with monkeys you are not talking about jaw-clenching but you are talking about biting, is that what would—is that it? A. That's correct, that would be a helpful alteration.

Q. All right. A. We already talked about the "mad" and inferring that I made conclusions using such terms. They're inaccurate.

Q. Yes, you already mentioned that, so let's not repeat. A. Now, then later in that—later in that paragraph, that drunken monkeys don't react as fast as sober monkeys. [Page 217] Now, sir, I don't know where anyone, including the Senator, could ever have drawn a conclusion on that on the basis of any of our work. We have studied alcohol. Let's eliminate the term "drunken". Let's not focus on that. What I am saying to you is that I have not reported a substantive finding to any agency that animals' slowing down their behavior results from alcohol. I am telling you categorically that I have never in any way implied or inferred that relationship between alcohol, the influence of alcohol and performance, okay? What I am saying is that that is a fabrication.

* * *

[Page 240] Q. What about your conversation with Mr. Krasnegor? A. I was told by Dr. Krasnegor that Mr. Schwartz had called him and—

Q. Now, when was your conversation with Mr. Krasnegor? A. In the late fall of 1975.

Q. And what was the conversation that he was reporting to you, when was that have supposed to have occurred? A. I inferred that it was only several days prior to the conversation between Dr. Krasnegor and myself.

Q. And what was relayed to you by Mr. Krasnegor? A. That a Mr. Schwartz from Senator Proxmire's office had contacted him, that stated that we had been involved in a major scandal in Michigan, asking Dr. Krasnegor whether he was aware of this fact, ah, and that he stated, you know, we didn't give you guys the Golden Fleece.

Q. Anything else? A. Well, there were other comments by Dr. Krasnegor regarding the conversation, but none reporting communication from Mr. Schwartz.

Q. Now, was that what Mr. Krasnegor relayed to you as [Page 241] Mr. Schwartz' words, "a major scandal in Michigan", or is that your characterization? A. To the best of my knowledge to remember, those were the words which Dr. Krasnegor used as an accurate reportage of the words of Mr. Schwartz.

Q. Did Mr. Schwartz report to him what he was referring to? A. Dr. Krasnegor told me that he simply listened and said something like, oh, really, what happened? And yes, I am remembering a little more of the conversation now; and Mr. Schwartz said, well, he was, ah, accused of misuse of public funds and equipment; and Dr. Krasnegor related to me that he said, oh, really, well, what's happened on it; and Dr. Krasnegor related to me that Mr. Schwartz said, well, gee, I don't know, it's funny, I haven't heard anything that's happened, I can't understand it.

Q. Anything else? A. I believe but I am not absolutely certain of this, that Dr. Krasnegor told me that he told Mr. Schwartz that he would look into it.

Q. Anything else? A. About what?

Q. Anything else that Mr. Krasnegor related to you that Mr. Schwartz had told him in his telephone conversation in late fall, 1975. [Page 242] A. Well, he—he told me that, first, this was an in-person contact between Dr. Krasnegor and myself. He told me—

Q. What do you mean by "an in-person contact"? A. He told me this at a National Conference of Cocaine Abuse, which occurred at Duke University, at which he was one of the organizers, of which I was a participant.

Q. And his conversation with Mr Schwartz was only several days before? A. Let's say no longer than a

month is my impression, but I only gave you an impression before. I just . . .

Q. Well, several days to a month, is that right? A. That's my impression, that it was a recent conversation.

Q. What else did he relay? A. Miss Emley, who was on the program also, came up, this was during—this entire thing took place during an intermission in the program, came up and the three of us were standing there, and Mr. Schwartz—excuse me, Dr. Krasnegor, in response to some comments by me, Dr. Krasnegor tells me that Schwartz called him, something to that effect, I kind of introduced the conversation when she walked up and Dr. Krasnegor reported and said, yea, he called and said we didn't give you guys the Golden Fleece.

Q. He repeated the statement, in other words, that he had [Page 243] already told you about? A. Correct.

Q. Anything else? A. Regarding a report of Mr. Schwartz' behavior

Q Yeah, that's all I am interested in. A. No.

Q. Now, what did you say to Dr. Krasnegor with respect to this telephone conversation or the issues raised in it? A. I expressed really grave concern. I said something like, My God, that guy is never going to get off my ass, something to that effect. I thought that this was all done and gone with. In other words, it was the first spectre of a continuing effort or intervention or making waves, producing concern with the agencies in almost four, five months.

Q. Did you explain anything with respect to the matters raised there? A. Well, Dr. Krasnegor was already aware of the audit. Dr. Krasnegor, at an earlier point in time, obtained a copy of the audit, at a slightly earlier

point in time. It was related to me by Dr. Krasnegor that the agency had decided that it was important to give their legal staff this audit document to look at, and that our contract, ah, extension would be delayed during this period.

* * *

[Page 389] A. (Mr. Raywid) You had contacts with Morton Schwartz on two occasions, did you not? A. More than two occasions.

Q. All right, could you describe how many occasions? A. I can be quite certain of three, and my memory tells me that there may have been four.

Q. What was the first one? A. The first one was a call placed to me by Mr. Schwartz prior to the release of the Golden Fleece Award to which I made reference yesterday, wherein he described the fact that I was under investigation by Senator Proxmire, I and my research and that—

Q. First of all, can you establish it by date, when you say prior to the Fleece, so we know that is prior to April 18? A. Yes, and yesterday I mentioned the Monday or Tuesday prior to the Thursday, Friday release, et cetera, and as I said, he told me that the Senator was investigating me and my research sponsored by the Federal agencies and was I aware of the fact that he had a Golden Fleece program, and I informed him that several agencies had already called me, asking me for information and informing me of his contacts [Page 390] with the agencies. He told me that as a courtesy to me, the Senator wished that I have a copy of the release beforehand. I told him that I thought that was nice of him, and there was then a questioning by Mr. Schwartz about who I was funded by, and he said we have these

agencies, and he listed some agencies. He said are you funded by those agencies, and I said yes, and that was the end of the communication on that call. It's fair to say that he also stated that either he would call me back or if I had questions subsequent to the receipt of the release, that I should call him. I don't remember which way it was left.

Q. Did he say he was going to send you a copy? A. Yes.

Q. Did he obtain from you your address? A. Yes. Maybe, I can't be sure of that because he may have already had it. It's reasonable that he may have, I don't remember.

Q. Did you state anything to him? A. Not that I recall, other than what I've described.

Q. Did he mention how many agencies, three or four? A. I believe three.

Q. Did you identify a fourth? A. No, I did not.

Q. Did you provide him with any other information except [Page 391] confirmation that the three agencies—A. I was not asked for any other information. I confirmed what he asked me.

Q. Did you make any notation of the telephone call? A. Regarding his name and his phone number, yes.

Q. Any other notation? A. No.

Q. Did you transcribe or record? A. The date that he told me the release was being prepared for.

Q. And what did he advise you? A. I can't be very clear on that because I also have in my memory the recollection of some surprise when I saw the date of the release because it seemed earlier to me than had, by my impression, on the basis of the call to Mr. Schwartz.

Q. Do you recall anything else? A. Regarding that phone call, no.

Q. What was your next call? A. On Thursday morning, as I told you earlier, I received the release, read it, sat down and constructed the statement which eventually was released by, out of my laboratory, and my recollection is that I called Mr. Schwartz at that time. He may have called me, I can't be sure. My impression is that I called him. [Page 392] Q. Do you know what time of day that was? A. It would have been in the—my recollection is that it would have been in the late morning or early afternoon, probably late morning.

Q. What was said? A. I told him that I received the release, that I had already been called by several newspapers, that I didn't understand because the date of the release was for the following morning and how did this happen. He told me that, well, these things go through channels and they are careful not to release until a certain time. I can't imagine how these agencies had already found out. He said, well, do you have any comment or criticism of the release? I said, well, the entire release is a travesty or mocking of the truth. It's a total distortion, as I remember I put it. Well, for example, he said, what—I said, well, first, you don't even have my name right. He went through a profuse apology with regard to my name being inaccurate and stated that he would immediately contact the wire services and attempt to correct my name. He said, well, what else about it? I told him, from beginning to end it was a falsehood and a highly critical document, that I was unhappy. There was some dialogue about my questioning him with regard to why the Senator engaged in these practices, that it was highly detrimental, [Page 393] not only to individuals singled out for attack, but to agencies. What credentials—

These are all paraphrases of statements I made to him—what credentials did the Senator have which afforded him the opportunity to speak with authority or with knowledge on the subject.

Mr. Schwartz told me that, well, the Senator thought it was important, the issue of waste in government and whatever it took to bring this to the fullest consciousness or more immediate attention of the agencies which, he said, the Senator felt were extremely wasteful of funds in these very tight economic times; with regard to the expertise of the Senator, he was an extremely well-informed and well-read man, took great interest in the material that his staffers developed, he was an economist by training. I asked him why then, if the Senator had read all of the documents, he didn't give me a direct answer on that. He stated, well, he certainly looked at the overviews prepared by the staff. I said, how is the staff prepared to read with accuracy and qualification my work, and he stated that, of course, they had someone trained in the area on the staff. I asked him specifically what was his training. I believe he told me either in sociology or social work. I said, well, who is this person that is an expert upon which you rely? He mentioned another gentleman, I don't know his [Page 394] name. I would be speculating to say it was Mr. Schuman. He told me this person has done graduate study in psychology. I said, what do you mean? He said, he's either working on a Master's or has a Master's Degree in Psychology. I said, in what area; I don't remember what he told me. My recollection is that it was not in experimental psychology but in another area of psychology. I asked him again whether the Senator didn't think that this was a highly damaging thing and that criticism from anyone other than expert in the field would, from a person with

his position and power, could do very considerable damage. He told me that the Senator, in general, had very negative feelings about academicians. That these had developed since his—what the Senator viewed to be very counterproductive interactions with economists during hearings. The impression was conveyed that the Senator had brought forth academic economists to testify before him or had been present while testifying, and he had found them giving predictions on economy on every side of the issue, and that since that time, the Senator displayed very considerable disgust and annoyance with the wooly-headed ivory-tower social scientists, even though Mr. Schwartz pointed out he was a social scientist by training himself.

I asked if the Senator was also focusing [Page 395] and looking closely at research, other than in the social science area. He told me, well, he certainly wanted to. They certainly wanted to, not to single out social science, though the Senator did seem to have a considerable bias with regard to social scientists, considered them to be soft, really not scientists, perhaps pre-scientists or artists; but their training on the staff at the present time didn't allow them to speak with authority or look meaningful at the harder sciences, that they were within the constraints, the budgets within the Senator's office, hoping to be able to hire scientific competents in the hard sciences. I remember that was the general discussion which took place at that time in that conversation.

* * *

[Page 411] Q. After your formal response from the Navy, was there any other contact or question with respect to your patent? A. I've heard nothing.

Q. Have you ever had any occasion to visit Madison, Wisconsin? A. No, I've never been to Madison, Wisconsin.

Q. Do you have any business interests there? A. No.

Q. Do you have any connection at all with Madison, Wisconsin, to your knowledge? A. I have a lawsuit.

Q. Other than the lawsuit? A. No.

Q. Now, you stated in response to one of the questions that you thought that the press release itself indicated malice, is that correct? A. That's correct.

Q. Would you care to indicate, would you refer to it and would you indicate in what way you believe it to be malicious? A. Well, let's say he's speaking of me in this release as an unsavory character, as one which men in general are [Page 412] offended by, by implication he's calling me a fleecer. He's calling me someone who fleeces. The fact that this is a reasonable interpretation is borne out by any number of newspaper articles. To digress for a minute, you see by choosing the term fleece to entitle his program of benefication, he's using a term which confuses two separate usages. That usage where someone puts on a fleece and sneaks into the herd so that he can capture young animals or pulls the fleece over someone's eyes so that they cannot observe what is going on as opposed to the mythology of Jason and the Fleece. To the extent that there is any implication in here that I, in fact, fleeced agencies rather than brought them a fleece or even brought them a fleece or tried to bring them a fleece, promised that I would bring something that I had only heard about and could not possibly actually produce. Then, he's talking about me as one who fleeces as a crook. That's pretty offensive thing to be called, but more important than that, it indicates gross derogation and condemnation because of behaviors that people universally condemn. He refers to me as the good

doctor. Such a term is frequently, perhaps most frequently, used to refer with distance and disdain, that is it's a transliteration with words to a different meaning. He's stated that I have perhaps engaged in duplicity.

[Page 413] Q. Where is it stated what you are referring to specifically? A. He's talking about funding which is perhaps duplicative. When one engages in a duplicate production, a clear implication is that he has attempted to defraud. He engages in duplicity. He presents something as something else so that his statement is clearly again casting me in a group of people who are engaged in unethical, illegal behavior.

With regard to malice, he states, the funding of this nonsense makes me almost angry enough to kick, scream and kick or even clench my jaw. He's indicating anger, some level of anger. Angry enough to engage in violent outburst, in fact that which he engaged in. He's indicating passion, negative passion, passion which, in colloquial communication, is the predecessor or emotion to attack and aggression and violence toward other people, violence which he is producing towards myself. Now, at another level of my belief that the Senator was demonstrating malice as shown right within this release, he consistently and recurrently describes, purports to describe my work in ways which are not simply inaccurate, but which, in several cases, bear no relationship whatever to truth as a layman would understand it after a careful reading, or as an expert would understand it. When somebody continually asserts [Page 414] reality in a way which bears no relationship to reality and connects that with critical, mocking discourse with regard to the person that he's describing, it's obvious that his intentions are to do great damage to the individual that he couples with that consistent gross distortion of the truth. We call it rumor-

mongering sometimes. We call it bad-mouthing, we call it telling lies about people to the extent that it departs from the truth, that it is a stamp having to do with someone or the world of someone. It is intended to create a negative impression in other people's minds about that person. It is called an ad hominen attack, personalized, vindictive, direct distortion of that person or something about him. The effect that he was not simply concerned, as purported by some statements of his, to be interested in taxpayers, in tax money waste, is indicated because he didn't restrict his discourse in this release to my activities with the Federal Government and the obligation I had and the interests in the agencies. With regard to me, he collects and announces to people private things about me, my association with a not for profit organization. He, therefore, collectively lumps my personal relationships that are of no business, of no relevance to his concern for the waste of tax money. An implication can be drawn from that very same content that [Page 415] he's attempting to suggest that my establishment of or relationship with this organization is, in some way, to create a funnel or an unseemly or unethical, unlegal, improper method of drawing funds to me. It would rely upon the general discourse in the newspaper and such about tax exempt organizations and whether they are dodges for the accumulation of wealth and would be a reasonable suspicion for the reader of this document. So again, he's demonstrated malice to me. Because he has failed to give proper credit for some of the research he describes here to other investigators, he places me in a position of embarrassment and hurt. He places me in a position where I may be attacking—attacked by other people.

Q. What work are you referring to and what individuals? A. Several of the studies assumed under the description, the very inaccurate description, of what variables

were investigated and what species were investigated, do not give colleagues for their participation either as junior investigators and, in some cases, as senior.

Q. Can you be more specific, what are you talking about, what phrase and who is omitted? A. Well, I would have to cite all of the publications which you now have or will shortly have a copy of. This is an extremely brief description.

* * *

[Page 419] Q. How long do you think it would take? A. Perhaps an hour.

Q. Perhaps that would be appropriate for a written response if we do wish to pursue it.

Anything else? A. Additionally?

Q. Excuse me, if it would take you an hour to state it verbally, do you think that mentioning all of this work and giving it proper factual statement would perhaps take an hour to read? A. Or more.

Q. So it's not capable to summarize your work and give appropriate credit to everybody in two pages? A. That's exactly right.

Q. How many pages would you estimate it would take? A. Whatever it would take.

Q. How many pages would you estimate it would take? A. I've never attempted to do such a thing.

Q. You haven't attempted to describe your work? A. Accurately and with full documentation, no, I have not. I've never attempted to do that.

Q. You couldn't describe your work in a couple of lines? A. If I chose to.

Q. All right, and would you—but in order to summarize this work and only to give credit, it would take at least an [Page 420] hour for you to narrate, is that correct? A. If I was very careful and thoroughly prepared beforehand and I wished to do that, I believe I could make a statement of my work and all of the proper credits to people and organizations and its merits within an hour.

Q. Anything short of that? A. It would be very, very difficult. Are we still talking about malice?

Mr. Cavanaugh: Doctor, in replying to him, please keep in mind the hour and how long we've been here and keep it reasonably brief.

The Witness: I tried to say before that recurrently the Senator chose to describe me directly or imply about me that I was either acting illegally or unethically or with subterfuge or duplicity. He continues that line of personal criticism when he says . . . If Dr. Hutchinson is successful in this new grantsmanship attempt, he receives an additional $150,000 of taxpayers' money.

When one uses the term grantsmanship, it's often in a condemnatory and ridiculing way. It refers to the partisanship of extracting money independent of other things. It's like talking about the guy who sells at the carnival, everything is in the motions. The substance counts for nothing. * * *

* * *

AFFIDAVIT OF ROBERT BARON, NOVEMBER 8, 1976, PLAINTIFF'S TRIAL EXHIBIT 6, U.S. D.C., WEST. DIST. OF WISC.

STATE OF INDIANA

SS.

COUNTY OF TIPPECANOE

ROBERT A. BARON, being first duly sworn, states:

1. I am a professor in the Department of Psychological Sciences of Purdue University, West Lafayette, Indiana. I obtained a Bachelor of Science Degree from Brooklyn College in 1964, and a Master's Degree from the University of Iowa in 1967. I received a Ph.D. Degree from the University of Iowa in 1968. For the past eight years, I have been engaged in teaching and research at the University level. I have published approximately fifty articles and four books on psychology and various aspects of psychological research. I am a member of the American Psychological Association, the Midwestern Psychological Association, and the Society of Experimental Social Psychology. In 1974 I received an award for Teaching Excellence from Purdue University for my activities in the Department of Psychological Sciences.

2. In 1972, I applied for and received a research grant from the National Science Foundation to study aggression and the effects of heat upon such behavior. My research proposal which led to the NSF grant was submitted to NSF's normal grant application review procedures, including evaluation by the NSF staff and evaluation by a committee of peer scientists. My research proposal was accepted by NSF, assigned a priority for funding, and eventually was funded. NSF provided approximately $46,100 to Purdue University over the course of the two-and-one-half year study.

3. On or about March 16, 1976, Senator William Proxmire issued a news release criticizing my research and NSF's funding of it. A copy of that news release is attached to this Affidavit as Attachment 1.

4. The news release states that the Golden Fleece of the Month Award was given to the National Science Foundation for "spending $46,100 to study the effect of scantily clad women on the behavior of Chicago's male drivers." Most of the rest of the news release was devoted to a discussion of the alleged study of the effect of scantily clad women on male drivers.

The statement in the news release that $46,100 was spent to study the effect of scantily clad women on the behavior of Chicago's male drivers is false. The $46,100 was expended to support the entire two-and-one-half-year research project. The bulk of that grant was used for laboratory studies to determine how excessive heat affects behavior, particularly a person's tendency to commit acts of aggression. The concept of the research project sprang from the riots during the 1960's and 1970's. Heat was considered to be an important factor in initiating that violence, but no scientific study had been made of the effect of heat on such violence. Our research investigated the "long, hot summer effect" frequently blamed for urban disturbances.

5. The part of our research that involved motorists in traffic jams represented only a minor portion of the entire project, and was one of the last pieces of research performed within its scope. It was intended to determine whether the findings we had obtained under controlled laboratory conditions could also be obtained under more natural circumstances. Specifically, we observed the emotional reactions of motorists in air conditioned cars as opposed to that of motorists in non-air conditioned cars

on warm summer days. This part of the project required less than three weeks, and incurred costs of less than $100.00

6. Senator Proxmire's news release took this very small portion of our two-and-one-half-year project, presented it out of context, and gave the impression that it represented the whole of our study or at the very least a major portion of it.

7. Senator Proxmire's news release was issued approximately a year after our project was completed. During the course of the project, regular reports were filed with NSF and review of those reports would have disclosed the true nature of our work.

8. I was not contacted by Senator Proxmire or his staff prior to his news release and I was not given an opportunity prior to the news release to explain to Senator Proxmire the true nature of our work.

9. The news release resulted in wide-spread publicity for me and my work. I have collected some of the newspaper accounts of the news release; they are attached hereto as Attachments 2 through .....

10. The news release and the resulting publicity was very upsetting to me and to my family and resulted in much emotional turmoil for us. My hometown newspaper, for example, carried the story resulting from the news release and captioned it with this headline: "Purdue Prof's Study 'Ridiculous'." After the news release appeared in print, both my wife and I received many adverse and critical comments about my work from a number of acquaintances.

/s/ Robert A. Baron
Robert A. Baron

Subscribed and sworn to before me this 8th day of November 1976

/s/ Eloise G. Warren
Notary Public

My Commission Expires: 4 September 1980

BARON AFFIDAVIT, ATTACHMENT 1, PRESS RELEASE BY SENATOR PROXMIRE, MARCH 16, 1976, RE: GOLDEN FLEECE AWARD GIVEN TO DR. ROBERT A. BARON, PLAINTIFF'S TRIAL EXHIBIT 6, U.S. D.C., WESTERN DIST. OF WISC.

FOR RELEASE After 6:30 A.M. Tuesday March 16, 1976

Senator William Proxmire (D-Wis) Tuesday gave his "Golden Fleece of the Month" award for March to the National Science Foundation for "spending $46,100 to study the effect of scantily clad women on the behavior of Chicago's male drivers."

Proxmire is the Chairman of the Senate Appropriations Subcommittee charged with the responsibility of reviewing the budget of the NSF. The "Fleece of the Month" award is given each month for the biggest or most ridiculous or most ironic example of government waste.

"This study was supported by an NSF grant on 'Environmental Determinants of Human Aggression' given to Dr. Robert A. Baron, now of the University of Texas, when he was at Purdue University.

"The method of operation was simple. Dr. Baron's assistant would pull his car to a stop at a red light at a Chicago intersection. When the light turned green, the assistant would refuse to move the car for about 15 seconds. The purpose was to determine when and how often the driver immediately behind would become impatient and aggressive enough to honk his horn at the assistant to get moving.

"In order to see if 'environmental determinants' such as sexual arousal, humor and empathy reduced 'human aggression' in the form of horn honking, Dr. Baron had a young woman walk past the stopped driver dressed in a variety of costumes.

—In the 'sexual arousal' case, Dr. Baron had his female 'dressed in an extremely brief and revealing outfit of a very unusual type.'

—For the 'humor' case, the young woman wore 'an outlandish humorous clown mask.'

—In the 'empathy' case, the woman 'hobbled along on crutches and wore a bandage on her left leg.'

"Dr. Baron concluded that the different costumes had their intended effect. He reported that not only did male drivers smile at the briefly attired young lady and watch her walk down the street; but some whistled or made sexually-oriented comments.

"Dr. Baron found that empathy and humor as well as sexual arousal reduced the amount of horn honking.

"But Dr. Baron did not stop his NSF supported research after the completion of the study of humor, sex and horn honking. He went on to find out with funds from the same grant that people who get literally hot under the collar when placed in a very warm room become aggressive unless cooled off by a drink of iced lemonade.

"While this piece of contrived research may appear ridiculous to most American taxpayers, the National Science Foundation officials who authorized spending $46,100 on

this project must have had something like the following in mind: To reduce the tension and aggression of drivers caught in the middle of traffic jams in American cities, the Foundation seems to tell us we should organize thousands of bikini wearing young women, clowns, and women with broken legs to strut, dance, and stagger across the streets at every busy intersection in every big city in every rush hour from now on.

"That's not my way to bring down unemployment."

AFFIDAVIT OF G. WILLIAM WALSTER, NOVEMBER 9, 1976, PLAINTIFF'S TRIAL EXHIBIT 4, U.S. D.C.,WESTERN DIST. OF WISC.

STATE OF WISCONSIN)
: ss.
COUNTY OF DANE)

I, G. WILLIAM WALSTER, after being duly sworn, state:

1. I am an associate professor at the University of Wisconsin-Madison. I teach Statistics in the Sociology Department. I received the Bachelor of Arts Degree from Stanford University in 1963 (Honors in Psychology) and the PhD Degree from the University of Minnesota in 1968. I am a member of the Institute of Mathematical Statistics, the American Statistical Association, the American Psychological Association, the Society of Experimental Social Psychology, the American Mathematical Society, and the American Sociological Association. I have been the author or co-author of numerous scientific articles and publications.

2. My wife, Elaine C. Walster, is a professor in the Department of Sociology at the University of Wisconsin-

Madison. She received the Bachelor of Arts Degree from the University of Michigan in 1959 and the PhD Degree from Stanford University in 1963. She is a fellow of the American Psychological Association, a member of the Society of Experimental Social Psychology, a member of the American Sociological Association, a fellow of the Society for the Psychological Study of Social Issues, and a member of the Association for Women Psychologists.

3. Both my wife and I teach and engage in research at the University of Wisconsin-Madison. My wife and I were co-investigators in the research project which is discussed in this affidavit. My wife is currently in Indonesia and will not return to this country until November 11, 1976.

4. On about March 13 or 14, 1975, Elaine Walster was telephoned by Mr. Robert Mills, an aid to Senator William Proxmire. Mr. Mills referred to a research project that I and my wife were performing under a grant from the National Science Foundation (NSF Grant GS 30822). Elaine explained to Mr. Mills that we had been involved in research in social relationships for a long period of time and specifically that we had been testing "Equity Theory." "Equity Theory" attempts to determine or predict what will happen when a party in a relationship perceives a relationship is unfair, that is, feels that he or she is receiving less or more from the relationship than he or she is giving. In our research, we have applied Equity Theory in general to five categories of relationship: (a) exploiter/victim; (b) legal; (c) philanthropist/recipient; (d) industrial; and (e) intimate. Elaine tried to explain to Mr. Mills that we had explored such questions as: Does a person feel uncomfortable when he gets more than he deserves from a relationship . . . or only when he gets less than his share? What determines

whether a person becomes angry when he's victimized . . . or passively accepts his fate? What motivates victims to blame *themselves* for their sorry condition? Elaine further explained that in only two of our studies had we even interviewed dating couples. Moreover, Elaine told Mr. Mills that he could find out more about our NSF research by consulting the progress reports we filed with NSF from 1971-1974.

It is difficult to accurately communicate the details and thrust of years of research over the phone. Elaine therefore asked Mr. Mills if he would like us to write a summary of our research work and to send it to him. Mr. Mills stated that he desired that we do that. We then began writing an explanation and summary of our research work, and on March 15, 1975, we sent the summary to Mr. Mills. A copy of our letter to Mr. Mills is attached to this Affidavit as Attachment 1.

5. At about the same time, Senator Proxmire's office released a news release referring to our work. The news release, a copy of which is attached to this Affidavit as Attachment 2, indicates at the top that it is "FOR RELEASE AFTER 6:30 A.M., TUESDAY, MARCH 18, 1975." However, we were telephoned by a member of the news media on March 15, 1975, the same day we sent our letter to Mr. Mills. The newsman alerted us that a forthcoming press release would expose our research on "drugs" and "Masters and Johnson-type sex research" . . . and asked all about it. The reporter indicated that the news release had been made available on March 14 or March 15, 1975. Thus, Senator Proxmire's office did not wait for Mr. Mills to receive the summary and explanation of our research work before issuing the news release.

6. The news release stated in part that "a $620,000 National Science Foundation Grant to the University of

Wisconsin-Madison to study passionate love is an outrageous waste of the taxpayers' money." The news release also stated that we had given students caffeine (coffee) and sent them off on "simulated" dates. This research was never conducted. We never even asked students a single question about their love or sex lives.

7. The statement in the news release to the effect that the National Science Foundation had granted $260,000 to the University of Wisconsin-Madison to study "passionate love" is not true. It is true that a small part of our total research involved applying "Equity Theory" to intimate relationships. But "intimate relationships" did not mean sexual relationships or "passionate love." Rather, the "intimate relationships" that we studied involved the warm, loving bonds that exist between parent and child, husband and wife, friend and friend. In our research, we discovered that Equity Theory does indeed apply to these intimate relationships. We did not study passionate love under the National Science Foundation Grant referred to in Senator Proxmire's news release.

8. The preliminary grant proposal for the grant referred to in Senator Proxmire's news release was submitted to the National Science Foundation ("NSF") in 1970. NSF, following its usual procedure, submitted our preliminary grant proposal to a panel of eminent social scientists for review. Research grant proposals submitted to NSF are subjected to careful, critical review by disciplinary and/or inter-disciplinary committees, consisting of leading research scholars, who not only make recommendations based on detailed scholarly review of the proposals but also give each approved project a priority rating for funding. The projects that pass this review are, also, scrutinized by the professional staff of the agency and by a presidentially appointed board of prominent citizens to deter-

mine whether the project falls within the congressionally mandated purposes of the Foundation and is worthy of public support.

NSF gave us very detailed information about the strengths and weaknesses the various researchers saw in our preliminary grant proposal.

When NSF announced its grant awards, a number of other researchers, who were working in the same area as proposed by us, heard about our project and contacted us to describe their research and its relevance to our own.

As a result of the evaluation of our preliminary grant proposal by NSF and its consulting scientists, and as a result of the information we received from other researchers in the field, we redesigned our proposed research project. The original research proposal was changed before the research work ever started. NSF was immediately advised of the changes in our research proposal and the changes were officially made in the first year's progress report filed with NSF. Throughout our grant with NSF, we submitted reports to NSF indicating the research work being done. These are the reports that Elaine suggested Mr. Mills take the time to read.

9. The research grant from NSF referred to in Senator Proxmire's news release was for a four-year research study. Approximately three and one half years of the research had been completed at the time the news release was issued. The news release was based upon our preliminary original grant proposal and not upon the research work actually done. If the progress reports and other items on our research filed with the NSF had been reviewed before Senator Proxmire issued the news release, it would have been clear that we had not received $260,000

from the National Science Foundation to study passionate love.

10. As mentioned above, Senator Proxmire's news release stated that "One of the methods the investigator uses to measure arousal is to give participating students at the university caffeine tablets. and then arrange a 'simulated date' in the laboratory for the students with members of the opposite sex."

We did not give students caffeine tablets, and we did not arrange "simulated dates." Senator Proxmire apparently picked up that proposed method of research from our original preliminary grant proposal. If Senator Proxmire or his staff had asked us, we would have advised them that the just-quoted type of research was not performed. If Senator Proxmire or his staff had reviewed the progress reports at NSF or discussed our work with the project officer at NSF, Senator Proxmire would have learned that that research was not performed.

11. Senator Proxmire's news release did not refer to my wife or me by name. However, my wife's name immediately became known to the news media because during the weekend of Friday, March 14; Saturday, March 15; and Sunday, March 16, 1975, we were besieged by telephone calls and inquiries from the news media. The news release resulted in a great deal of publicity about my wife, including numerous newspaper articles. Some of the newspaper articles were quite sympathetic, while others were highly critical. For example, Mr. James J. Kilpatrick's column in the March 27, 1975 "Washington Star" referred to our grant and some other grants as "a reckless and irresponsible rip-off of the tax payers." I have collected some of the newspaper articles resulting from Senator Proxmire's news release, and they are at-

tached to this Affidavit as Attachments 3 through 6. The faculty of the University of Wisconsin-Madison has been supportive of us throughout this professional and personal trial. On March 20, 1975, the Department of Sociology of the University of Wisconsin unanimously adopted a resolution deploring the attack upon Professor Elaine Walster. A copy of that resolution is attached to this Affidavit as Attachment 7. On April 14, 1975, former Madison Chancellor William Sewell, now a professor of Sociology, asked the University of Wisconsin-Madison faculty senate to approve a resolution deploring the attack on our research work. A copy of Professor Sewell's address to the faculty senate and the adopted resolution are attached to this affidavit as Attachments 8 and 9. I believe Professor Sewell's speech (at page four) accurately states the way in which our research was misconstrued and accurately states (at page two) the NSF's method of evaluating proposed research. I am also in agreement with Professor Sewell in his comments regarding the dangers to social science research caused by such uninformed attacks.

12. Soon after this early series of exchanges, we made one more attempt to inform Senator Proxmire about our Equity research. We sent him a progress report entitled *Equity: Theory and Research* (Boston: Allyn and Bacon, 1977). This book details all the Equity research we have conducted on federal grant funds. On October 11, 1975, Senator Proxmire sent us a personal note indicating that he had received *Equity: Theory and Research.* A copy of this letter is attached to this Affidavit as Attachment 10.

13. However, on two occasions since his note, Senator Proxmire has attacked our "love-machine" research. In a letter to his constituents (February 9, 1976) he asked: "Did the Golden Fleece get results?" He answered: "The National Science Foundation did not renew two of the

three contracts to consultants studying 'love'" (i.e., of the research of Dr. Ellen Berscheid, the Walsters, and Dr. Zick Rubin, the contracts to Dr. Berscheid and the Walsters were the two not renewed). A copy of this letter is attached to this Affidavit as Attachment 11. Similarly, a few weeks after Senator Proxmire's friendly note, he did a news spot in Madison in which he said that the Playboy Foundation should fund love and sex research like ours. Elaine was asked to respond.

14. Senator Proxmire's news release and the resulting publicity and furor has been very upsetting to me and to my wife, and has been disruptive of our lives. The telephone calls from the press, the questions from the press, the meetings with reporters and the other interruptions that surrounded the news release kept us in a state of agitation for about one month. It will take much longer than that for us fully to recover from the emotional trauma caused by this event. Our research work has been disrupted because it is very important for persons engaged in scientific research or other creative activity to avoid distracting anxieties and agitation.

/s/ G. William Walster
G. William Walster

Subscribed and sworn to before me, a Notary Public, this 7 day of November 1976.

/s/ Ruth M. Berthold
Notary Public, Dane
County, Wisconsin.

My Commission Expires: July 14, 1980

WALSTER AFFIDAVIT, ATTACHMENT 2, PRESS RELEASE BY SENATOR PROXMIRE RE: GOLDEN FLEECE AWARD, MARCH 18, 1975 TO G. WILLIAM WALSTER, PLAINTIFF'S TRIAL EXHIBIT 4, U.S. D.C., WESTERN DIST. OF WISC.

FOR RELEASE AFTER 6:30 A.M., THURSDAY, MARCH 18, 1975

Senator William Proxmire (D-Wis) charged Tuesday that "a $260,000 National Science Foundation grant to the University of Wisconsin-Madison to study passionate love is an outrageous waste of the taxpayers' money."

Proxmire is Chairman of the Senate Appropriations Subcommittee that reviews the budget of the National Science Foundation annually.

In a statement from his Washington office, the Wisconsin Senator said, "The National Science Foundation's summary of this project states that 'social psychologists have generally tried to explain passionate love within the reinforcement paradigm. Since data have not fit tidily into this framework, the investigator will turn to Schachter's theory to explain strong interpersonal attraction.'

"In language which is equally unclear, the NSF report further states that this research will rely primarily on 'the implications of Schachter's general theory of emotion, which suggests that the emotion an individual will experience depends on how he labels his feelings.' In an attempt to explain 'strong interpersonal attraction', the researchers will focus the major part of their attention on three questions:

"1. How can arousal be best defined?

"2. Can the same form of physiological arousal really generate all or almost all, emotions—given appropriate labeling? and

"3. Can individuals relabel their feelings, and under what conditions is this likely to occur?

"If scholars wish to make this kind of study independently, of course, they are free to do so, but to soak the taxpayer for more than a quarter of a million dollars is a disgrace.

"One of the methods the investigator uses to measure arousal is to give participating students at the university caffeine tablets, and then arrange a 'simulated date' in the laboratory for the students with members of the opposite sex.

"This $260,000 project seems destined to join similar NSF-funded studies at Harvard ($121,600) and the University of Minnesota ($84,000) in a futile and wasteful effort to define the impossible. For my own part, I do not care whether the project is done at Harvard or at Minnesota or my home state of Wisconsin. If it's a bad project and a waste of the taxpayers' money, it should not be done at any of these places.

"The National Science Foundation could spend its entire $750,000,000 FY 1976 budget trying to define 'arousal' and 'passionate love' and never get an answer.

"I think it is time the National Science Foundation put a stop to this Federal version of 'The Love Machine' and rearrange its research priorities to address our scientific, not our erotic curiosity."

WALSTER AFFIDAVIT, ATTACHMENT 8, REMARKS BY WILLIAM H. SEWELL, IN SUPPORT OF RESOLUTION OF UNIVERSITY OF WISCONSIN FACULTY SENATE, APRIL 14, 1975, PLAINTIFF'S TRIAL EXHIBIT 4, U.S. D.C., WESTERN DIST. OF WISC.

Mr. Chancellor and Members of the Senate, I have asked permission of the Faculty Senate to speak in favor of the resolution offered by my Sociology colleagues because I consider Senator Proxmire's attack in the public press against Professor Elaine Walster's research not only to be unfair to a valued member of this faculty but more importantly to constitute a serious menace to basic research and the freedom of scientific inquiry which all academic bodies must do their utmost to protect. It is important to realize that this threat is not simply to social scientists but, on the basis of what we now know, to basic research in the biological and physical sciences and humanities as well.

I shall make my remarks brief and will address only four major points which constitute the reasons why I believe this resolution deserves the support of all members of this faculty.

First, I see the Senator's current newspaper campaign, which so far has been concentrated on social science projects, to be primarily an attack on the peer review system of the National Science Foundation and indirectly on this system as it operates in other federal agencies. As most members of this body know well, research grant proposals submitted to NSF are subjected to careful, critical review by disciplinary or interdisciplinary committees, consisting of leading research scholars, who not only make recommendations based on detailed scholarly review of the proposals but also give each approved project a priority rating for funding. The projects that pass this review are, also, scrutinized by the professional staff of the agency and by a Presidentially appointed board of prominent citizens to determine whether the project falls within the congressionally mandated purposes of the Foundation and is worthy of public support.

Many people in this room have served with conscience and courage on NSF, NIH, or other peer review committees. I think they will agree with me that this system, although not perfect, is the best yet devised for determining the merit of research proposals. The scientific community must welcome efforts to improved present peer review procedures. At the same time it must object, through every legitimate channel, to procedures that force NSF and the individual scholar to be at all times on the defensive against any single Senator's adverse public view of an individual project.

Although it is obvious that the peer review system would rapidly be destroyed if many other Congressmen were to adopt Senator Proxmire's approach, I recognize that this may not be his intent. If his purpose is simply to express legitimate objections to the present review process or other Foundation policies, however, it is much more appropriate for him to voice these objections to the NSF Board or in the Foundation's budget hearings (over which he presides), rather than as unfair attacks on individual projects in the mass media.

My second point is that I believe the Senator's attack to be directed against, and to the degree that it succeeds, damaging to the whole concept of basic research. A number of his comments, make it quite apparent that he feels that public funds should be limited to studies with immedi-

ate or short-term practical pay-off, rather than to basic research. The great bulk of research funds outside NSF is spent on applied and development work. It would be unfortunate indeed if the National Science Foundation, set up by Congress for the express purpose of keeping this country a leader in basic research, were forced to shift an undue share of its attention to the short-term practical pay-off of the projects it supports.

Third, I am concerned about the effects of the Senator's attacks on the professional staff of NSF in particular, and on the scientific and scholarly community in general. My worry is that the staffs of NSF and of other research granting agencies will inevitably tend to discourage applicants from seeking funding for any kind of study which any influential Congressman might attack—even though the work falls well within the mandate of the Foundation and would be considered important by the relevant scientific committees. An even more serious chilling effect would be felt if young investigators concluded that it was unwise to propose important new studies on problems which, by their very nature, invited partisan attack or ridicule by powerful public figures.

Finally I believe that it is both irresponsible and unethical for a U.S. Senator to use his office and his access to the mass media to misrepresent an individual scholar's work by quoting selected phrases and words out of context. For example, in the present instance (to quote the Senator directly), Professor Walster's project is characterized, as "a grant to the University of Wisconsin-Madison to study passionate love", when in actuality it is a study to test the theory of positive affect—a theory that is tested by examining equity relationships involved in the interpersonal dealings of employers and employees, donors and recipients, aggressors and victims, engaged couples, hus-

bands and wives, and parents and their children. Without even having read the explanation of Professor Walster's study which she sent to him at his own request—without any apparent effort to try to understand or appreciate the fundamental research issues under study—the Senator gratuitously and quite inaccurately claimed that it was addressed to "erotic curiosity." No word except demagoguery can describe such actions, and they must be condemned by serious people in all areas of scholarship.

With or without such condemnation, we have reason to expect similar unjustified attacks against the research of scholars in the natural sciences and the humanities. In fact it has been recently reported in *Behavior Today* (March 31, 1975) that Senator Proxmire's staff expects to proceed with comparable examination of the hard sciences as soon as Congressional interns can be recruited who have some competence in the physical and biological sciences. The Senator's office has already asked for summaries of the more than 4,000 projects currently supported by the National Institute of Mental Health—many of which are in the bio-medical sciences.

It was after a good deal of thought and with some sadness that I concluded that I must speak out in support of this resolution. The Senator could have permitted us to do something considerably more constructive if he had accepted invitations that have been extended to him to meet with University scholars, express his concerns and explain his position, and discuss our fears about the serious threat to scientific inquiry that is posed by political attacks in the mass media. One of my distinguished colleagues, a member of this Senate, Professor Winsborough, extended such an invitation to Senator Proxmire months before the Senator's attack on Professor Walster's research. The Senator did not accept this invitation. I understand that

others have explored a similar approach. With deep regret I conclude that it is much too late for such discussions. The Senator is a politically astute man who must know very well what he is doing. I do not believe that it is realistic to expect a resolution by the Faculty of this University to influence greatly his political goals and actions.

But in fairness to ourselves and to the cause of science and scholarship everywhere, we cannot maintain a silence that will be interpreted either as approval of a basically anti-intellectual position or as a lack of concern about its dangerous consequences.

WALSTER AFFIDAVIT, ATTACHMENT 9, RESOLUTION OF UNIVERSITY OF WISCONSIN FACULTY SENATE RE: GOLDEN FLEECE AWARD OF SENATOR PROXMIRE TO G. WILLIAM WALSTER, APRIL 14, 1975, PLAINTIFF'S TRIAL EXHIBIT 4, U.S. D.C., WESTERN DIST. OF WISC.

On 14 April 1975, The University of Wisconsin Faculty Senate passed the following resolution offered by Professors John DeLamater, Gerald Marwell, Richard Schoenherr, and Halliman Winsborough, Senators, District 71 (Sociology):

> "That the UW-Madison Faculty Senate deplores the damage that is being done to basic research and to freedom of scientific inquiry by irresponsible and inaccurate attacks of the kind Senator William Proxmire recently made on research supported by the National Science Foundation including research conducted by one of our colleagues, Professor Elaine Walster.
>
> We fully endorse a legitimate concern for economy and for watchfulness in Federal Government support of scientific research, as in every other realm of governmental activity. But we must respectfully point out that Professor Walster's study had undergone rigorous review through every appropriate scientific and administrative channel. Her own recognition as a Fellow of the American Psychological Association and of the Society for the Psychological Study of Social Issues are further evidence of her scientific integrity and productivity.
>
> Subsequent events have made it clear that Senator Proxmire did not fully understand nor try to find out the true nature of this project. Professor Walster's research on equity relationships between employers and employees, donors and recipients, engaged couples, husbands and wives, and parents and children is mocked by the Senator's characterization of this work as a study of "passionate love" addressed to "erotic curiosity." It is significant that the Senator released his condemnatory statement after he had asked Professor Walster for further written information but before there was time for him to receive her reply.
>
> Decisions regarding the value of basic research must continue to be based on peer reviews. To the extent that in his personal opinion some funded basic research projects are wasteful, Senator Proxmire's criticisms must be directed at improving the Foundation policies and review criteria. To attack, instead, individual scientists' projects, through the mass media and on insufficient knowledge, is a threat to freedom of scientific inquiry which the Faculty Senate can only view with deep dismay."

They also voted to file a letter by William H. Sewell in support of the resolution.

AFFIDAVIT OF ELAINE WALSTER, NOVEMBER 15, 1976, PLAINTIFF'S TRIAL EXHIBIT 5, U.S. D.C., WESTERN DIST. OF WISC.

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

I, ELAINE WALSTER, after being duly sworn, state:

1. I have reviewed the Affidavit of my husband, Professor G. William Walster, dated November 9, 1976.

2. The information contained in that Affidavit is true and correct.

/s/ Elaine Walster
Elaine Walster

Subscribed and sworn to before me, a Notary Public, this 15 day of November, 1976.

/s/ Ruth M. Berthold
Notary Public, Dane County, Wisconsin.

My Commission Expires: July 14, 1980

AFFIDAVIT OF B. F. SKINNER, NOVEMBER 15, 1976, PLAINTIFF'S TRIAL EXHIBIT 1, U.S. D.C., WESTERN DIST. OF WISC.

Cambridge, Middlesex County, Massachusetts, 02138

I, B. F. Skinner, being duly sworn, say:

1. I am Professor of Psychology and Social Relations Emeritus at Harvard University. I have published twelve books in the field of behavior both human and sub-human.

I have received the National Medal of Science (from President Johnson), the Gold Medal of the American Psychological Foundation, the International Award of the Joseph P. Kennedy Jr. Foundation for Mental Retardation, many other awards, and 21 honorary degrees.

2. I am thoroughly familiar with Dr. Hutchinson's work. He is a student and former colleague of a student of my own, Nathan Azrin, one of the outstanding younger psychologists in America today, and I have followed their joint work and then Dr. Hutchinson's work with other colleagues and his own work as it appeared from year to year.

3. Dr. Hutchinson is a careful, dedicated, and intelligent scientist, and his field is very important. No problem today, with the possible exception of overpopulation, is more serious than that of aggression. In the last analysis this always reduces to aggression between individuals. Laymen, historians, and some psychologists are accustomed to discussing these issues simply in terms of everyday observations, but the only hope of something better lies in an experimental approach. I believe Dr. Hutchinson is tackling the problem at precisely the right point, and that his results already help in the interpretation of aggression in daily life. We should soon begin to find solutions to practical problems, beginning perhaps on a small scale in classrooms, work spaces, and city streets, but moving eventually to the international scene.

4. Senator Proxmire's Press Release, dated Friday April 18, 1975, completely misrepresents the significance and quality of this work. To take just one example, the reader would assume that Dr. Hutchinson was concerned only with whether people clenched their jaws. What is at issue is the need for a quantitative measure showing slight changes in the inclination to be aggressive. If jaw-

clenching is a sign of impending aggression, then it can be used to study conditions which contribute only slightly to the probability of aggressive behavior. The effect of alcohol on aggression is far too important to be dismissed as nonsense and so, with a third or more of the world actually hungry, is the relation to hunger. That Dr. Hutchinson has "made a fortune from his monkeys" is not only not true but a serious reflection on his character.

5. Senator Proxmire, or whoever prepared the statement he has allowed to appear over his name, has wholly missed the significance of research of this kind, and if one of the intents of the Golden Fleece Award is to dissuade agencies from granting support for research of this nature, it is a serious threat to science in America. It comes too close to governmental intervention in science in totalitarian and communist countries.

Signed /s/ B. F. Skinner
B. F. Skinner

Dated Nov. 15, 1976

Witnessed Patricia Foley

My commission expires: Jan. 19, 1980

AFFIDAVIT OF JOSEPH BRADY, NOVEMBER 16, 1976, PLAINTIFF'S TRIAL EXHIBIT 2, U.S. D.C., WESTERN DIST. OF WISC.

STATE OF MARYLAND)

ss.

COUNTY OF ANNE ARUNDEL)

I, JOSEPH BRADY, after being duly sworn, state:

1. I am a Professor of Behavioral Biology in the Department of Psychiatry and Behavioral Sciences at the

Johns Hopkins University School of Medicine. I received my graduate training at the University of Chicago, having been awarded the PhD degree in 1951. I am a Fellow of the American Psychological Association, the American Association for the Advancement of Science, and the Royal Society of Medicine. I am past president of the Eastern Psychological Association and of the Division for the Experimental Analysis of Behavior of the American Psychological Association. I have served as a Consultant to the President's Science Advisory Committee, the National Institutes of Health, the National Aeronautics and Space Administration, the National Science Foundation, and the Merck Institute for Therapeutic Research. I am Associate Chairman of the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research and have served as Chairman of the Advisory Committee of the National Institute of Drug Abuse. I have published and/or presented professionally over 200 scientific papers or books in the areas of behavior analysis, behavioral physiology, behavioral pharmacology, and behavioral neurology.

2. I am very familiar with the work of Dr. Ronald Hutchinson, having served on the Scientific Advisory Panel of the American Institute for Biological Sciences which reviewed his original proposal to the National Aeronautics and Space Administration in 1971. This Panel was composed of several eminent and experienced senior scientists in the areas of medicine, physiology, and psychology who carefully reviewed Dr. Hutchinson's research proposal, his previous publications, and his accomplishments in comparison with submissions from other scientists in the field competing for limited funds provided by this agency for such investigative undertakings. As a result of this competitive scientific review, the Panel judged Dr. Hutchinson's work to be of unsurpassed excellence and awarded

him a comparative merit rating of 1.5 on a 1 to 5 scale, with 1 being the highest rating and 5.0 the lowest. In my continuing association with the National Aeronautics and Space Administration since 1971 as a consultant and research investigator, I have maintained contact with Dr. Hutchinson's work through access to his subsequent progress reports and continuation grant applications to that agency.

3. For the past five years, I have been a member of the Scientific Study Section of the National Institute of Drug Abuse and in that capacity, I and other members of the Study Section have reviewed and evaluated all Dr. Hutchinson's grant applications and progress reports to that agency. In addition, I have read in detail all of Dr. Hutchinson's scientific publications and site-visited his laboratory with other members of the National Institute of Drug Abuse Study Section, having thus become thoroughly familiar with his work.

4. I have reviewed a copy of the news release labelled "For Release After 6:30 A.M., Friday, April 18, 1975," announcing that Senator William Proxmire was making the "Golden Fleece Award" jointly to the National Science Foundation, the National Aeronautics and Space Administration, and the Office of Naval Research for funding the research of Dr. Hutchinson. In my opinion, the news release unfairly emphasizes a most superficial description of this very important investigative endeavor and demeans the fundamental significance of the work in furthering our understanding of the critical individual and societal problems involving aggression and hostility. Being as familiar as I am with all of Dr. Hutchinson's grant applications, it is inconceivable that anyone could have read those documents with care and failed to see both the formal and substantive contributions which this work makes to a scientific analysis in the most pressing applied area. In this regard, the news release, in completely ignoring the relationship between the indicated experimental studies and the functional features of hostility and aggression in the natural ecology, is both misleading and unfair in its characterization of Dr. Hutchinson's research.

5. The references in this news release and the Golden Fleece Award by Senator Proxmire to Dr. Hutchinson have continued to provide a lively focus of discussion in scientific and professional circles for the year or more since their well-publicized announcement. The news release and award have not only made Dr. Hutchinson the object of ridicule and unwarranted criticism by both lay and professional groups which I have personally witnessed at such national meetings as the Annual Convention of the American Psychological Association, but this misleading and unfair publicizing of the views expressed in these award announcements has led directly to expressions of doubt and reservation about Dr. Hutchinson's personal integrity and scientific contributions by several colleagues and professional associates who would not have otherwise done so. More importantly, I believe, on the basis of my familiarity with the research review, evaluation, and funding process by the several agencies involved in considerations relevant to support of such investigative work, that the news release and announcement by Senator Proxmire of the indicated Golden Fleece Award has adversely affected the assessment of Dr. Hutchinson's representations to these agencies in so far as they have resulted in more careful and extended scrutiny of his research proposals than would otherwise have been the case.

6. Finally, I would like to emphasize the fundamental importance which I believe must be attached to the innovative and productive research by Dr. Hutchinson on aggres-

sion. In addition to the obvious relevance of this work in specifying conditions under which such destructive phenomena can be expected to occur, the possibility of developing effective countermeasures and constructive alternatives to the ever-growing societal problem of hostility and aggression depends critically upon a basic understanding of the relationships under analysis in this research.

/s/ Joseph V. Brady
Joseph Brady

Subscribed and sworn to before me this 16 day of November, 1976

/s/ E. Taylor Meiser
Notary Public
County, Anne Arundel

My Commission Expires: July 1, 1978

AFFIDAVIT OF RONALD R. HUTCHINSON, NOVEMBER 17, 1976, PLAINTIFF'S TRIAL EXHIBIT 3, U.S. D.C., WESTERN DIST. OF WISC.

STATE OF MICHIGAN)
: ss.
COUNTY OF INGHAM)

I, RONALD R. HUTCHINSON, being first duly sworn, state:

1. I am the Plaintiff in the case titled *Ronald R. Hutchinson* vs. *William Proxmire and Morton Schwartz*, United States District Court, Western District of Wisconsin, Civil Action No. 76-C-257.

2. It is very difficult to summarize seven years of my scientific research life, but the following is my attempt to summarize the work I did during the seven-year period

mentioned in Defendant Proxmire's news release of April 18, 1975:

My research during the 1968 to 1975 period involved the systematic exploration of three questions: First, what causes aggression?; second, how can we accurately and reliably measure aggression in the laboratory?; and third, what procedures can be developed to modify or influence aggression?

My work on these three questions has provided numerous general conclusions from different areas of inquiry, the more important and thoroughly tested of which I will describe below. From place to place in this affidavit, I will refer to those conclusions or areas of inquiry by number. (They will be designated as *1, *2, *3, etc.)

Our studies of the question "what causes aggression?" have shown that there are two major types of environmental conditions: (*1) the occurrence of painful, stressful, unpleasant, or detrimental events and (*2) the termination of satisfying, beneficial or pleasant events. (*3) We have shown that these two types of factors operate for widely differing species, including man. (*4) We have discovered that certain patterns of exposure to these types of conditions can cause the development of a gradual decrease in aggression while other patterns of exposure cause the development of hyperaggressive behavior. We have further investigated how the brain processes these two different types of environmental conditions. For example, we have confirmed (*5) that electrical activity in brain areas responsible for sensing stressful, painful, or detrimental bodily changes causes aggression. (*6) Similarly, we have confirmed that termination of electrical activity in the "reward" areas of the brain causes aggression. Thus, we have demonstrated a parallel between environmental conditions and physiological processes respon-

sible for aggression. Additional studies by myself have at least partially (*7) discovered how changes in bodily chemistry are related to increases and decreases in aggression. (*8) We have found how exposure to certain drugs of abuse cause the development of increased aggression.

Our studies of the second question, "How can we accurately measure aggression in the laboratory?", have shown that (*9) aggression can be reliably measured in several animal species by observing biting attack under controlled conditions where no other victim animal is present. We have (*10) perfected automatic attack-measuring instruments for the rapid and reliable detection of changes in aggression in direct simultaneous comparison to other nonaggressive-type behavior. These methods are capable of reliably measuring behavior without the time-consuming, costly, and less reliable procedures of direct visual observation by the experimenter. We have (*11) developed and extensively tested a method for the accurate and reliable detection of anger and the probability of attack by humans which employs standard laboratory instruments. This technique may be useful to measure annoyance, and irritability and aggressivity without discomfort or detection by the individual and far more sensitively than interview or "personality test" methods.

Our studies of the third question, "what procedures can be developed to modify or influence aggression?", have led to the discovery of procedures for (*12) changing the environment in ways which reduce the effects of stress or unfavorable circumstances and thereby afford protection to individuals against the development of aggressive behavior. Additionally, (*13) our experiments have discovered how drugs may be employed to reduce aggression and produce increases in attention to and successful coping with stressful environmental situations.

In all of this research, we have found that answers and solutions to the question described above are interdependent. For example, when we perfected a better, more accurate and reliable procedure for detecting aggression in monkeys we could then use the technique to more efficiently and accurately study how a given drug affected aggression. Thus, as with all research, the study of the causes, measurement, and treatment of aggression is a pursuit of answers to intertwined questions.

3. *Documentation of my work.*

Each of the federal research sponsorship agencies has been given numerous documents which describe the purposes, goals, and findings which I have described above. The process by which a federal agency is informed is as follows: A research scientist, from his study of scientific literature and from the research he has conducted may develop an idea or insight to a relationship or process in nature, or he may see an obstacle to understanding such. He may apply to a federal research sponsorship agency for financial support to study the problem or idea. The researcher's proposal will contain several sections (as described and required by the agency) usually including Title, Brief Abstract, Statement of Rationale, Exposition of the Procedure, including a description of the research to be performed, a detailed review of the general literature, a detailed description of previous work performed in the subject matter area by the reviewer, available facilities, and budget. After submission of a proposal, the federal agency goes through a systematic procedure of evaluation and review. Frequently, this process involves sending the proposal to seven to fifteen scientists at different institutions throughout the country for independent professional criticism. Sometimes, agencies circulate proposals among several "in house," experts for evaluation. A final step

often involves screening and evaluation by a scientific review committee composed of well-known scientists brought especially to the agency to evaluate the scientific merit, relevance, and priority of the proposal to the federal agency. A proposal will then receive an evaluation from four or five, or as many as twenty scientists and a final evaluation of priority or "relevance" will be assigned. The agency then will approve for funding those proposals rated most highly. With limited agency budgets, this means that proposals that receive funding invariably represent the few amongst many that may have been submitted that received high enough scientific merit and relevance ratings.

Following funding (perhaps, as is typical, only partial funding) the researcher will set to work.

Each agency requires periodic progress reports and a final report. Some agencies also periodically "site visit" the research program to obtain first-hand contact and evaluation. Progress reports contain descriptions of findings, graphs, charts, publications, and drafts of forthcoming publications which the scientist has produced during the period of support. Sometimes a final report will be contained as a part of a proposal for supplementary or renewal funding.

If the investigator seeks additional funds at expiration of a grant or contract, the cycle described above will begin anew.

In my research efforts, I have recurrently submitted funding proposals to various federal agencies. Frequently, these proposals have received high enough ratings so that support funds were awarded. When I have received funding from several agencies for work to occur in the same time period, funds have always been requested and

awarded for specific, separate experiments, sometimes of a complementary nature, but *never* have funds been awarded by a funding agency to perform the same experiments funded by another agency.

The sequence which I have described above as it has occurred with the National Science Foundation (NSF), The Office Of Naval Research (ONR), and the National Aeronautics and Space Administration (NASA) is presented in Exhibits 46 to 63. Exhibits 64 to 96 contain the technical articles, review papers, book chapters, and drafts of forthcoming manuscripts which the agencies have received from me as partial reports of progress. This then is the brief description of the full cycle of funding proposals, scientific progress reports, and technical publications, which occur as a sequence each time funding is provided by a federal agency. My purpose in describing this cycle with exhibits is to point out both the nature and extent of written material available to the agencies and provided by the agencies to Senator Proxmire for inspection and evaluation. In grant proposals, in progress reports and in technical articles, the general description of our work is thoroughly provided, carefully buttressed with extensive literature citations. The purposes of our investigations are described; and our conclusions are described in detail.

4. *Evaluation of the April 18, 1975 Proxmire news release.*

A. *What It Does Not Say*

The description of my research presented in the press release issued by Senator Proxmire I believe, is an inaccurate, misleading and defamatory statement, both as a general characterization and in the specifics which it describes. It is in error first because it consistently presents

individual, isolated events which fail to convey any organization, logic, theme, purpose or goal of the research. Except for a description of the titles of two research projects wherein the term "aggression" is employed, the press release focuses upon statements of isolated and independent tests and measurements. In no case does the Senator mention our purpose of understanding the causes of aggression, our purpose in accurately and reliably measuring aggression or our purpose for developing procedures to modify or influence aggression. Yet, each of these purposes is mentioned and described in detail in sections of grant proposals, progress reports and technical articles to which I have already referred.

In the beginning of my statement here, I mentioned several general findings which I have made over the course of my research program. I have stated that my work has shown that two general classes of environmental conditions are responsible for aggression in animals and man. (Points one and two earlier in this statement). These findings are recurrently stated in grant proposals, technical articles and review articles. See Plaintiff's Exhibit 70 entitled "The Environmental Causes of Aggression." Reference can also be made to the section entitled, "Previous Work of this Investigator" in each of the grant proposals. See for example National Science Foundation Proposal Plaintiff's Exhibits 48 and 49. The Senator's press release makes no mention of these general findings.

General finding three which is that these two types of environmental factors operate for widely differing species, including man. Confirmation of this statement can be found in grant proposals, for example, Exhibits 49 in the sections entitled "Previous Work of this Investigator," and the review article, Plaintiff's Exhibit 70. Senator Proxmire has made no mention of this general finding in his press release.

The fourth general finding which I have described is the discovery of how certain patterns of exposure to different environmental conditions can cause the development of a gradual decrease in aggression while other patterns of exposure cause the development of hyper-aggressive behavior. Confirmation for this statement can be found in Plaintiff's Exhibit 70 entitled "The Environmental Causes of Aggression" and in the grant proposal sections entitled "Previous Work of this Investigator," Plaintiff's Exhibit 49. Senator Proxmire has made no reference to this finding from our work in his press release.

The fifth finding which we have made is that electrical activity in brain areas responsible for sensing stressful, painful or detrimental bodily changes causes aggression. Confirmation for this statement may be found in Plaintiff's Exhibit 70, entitled "The Environmental Causes of Aggression." Further confirmation can be found in the Research Proposals, Section entitled "Previous Work of this Investigator," Plaintiff's Exhibit 49. No mention of this finding is made by Senator Proxmire in his press release.

The sixth finding which we have reported is that termination of electrical activity in the "reward" areas of the brain causes aggression. Confirmation for this statement is found in Plaintiff's Exhibit 70 entitled "The Environmental Causes of Aggression." Further confirmation is found ONR Research Proposals Section entitled, "Previous Work of this Investigator," Plaintiff's Exhibit 56. Senator Proxmire in his press release makes no mention of this finding.

The seventh finding which we have reported is the discovery of how changes in bodily chemistry are related to increases and decreases in aggression. Confirmation for this statement is to be found in Plaintiff's Exhibits 73 and Plaintiff's Exhibit 49, in the section entitled "Previous

Work of this Investigator." Senator Proxmire has made no reference to this general finding from our work.

The eighth finding which we have reported is that exposure to certain drugs of abuse can cause the development of increased aggression. Support for this statement can be found in Plaintiff's Exhibits 49 in Section entitled "Previous Work of this Investigator," in Plaintiff's Exhibit 73, entitled, "Basis of Behavioral Influence of Chlorpromazine." Senator Proxmire makes no mention of this finding in his press release.

The ninth finding which we have reported is that aggression can be reliably measured in several animal species by observing biting attack under controlled conditions where another victim animal is not present. Support for this statement may be found in Plaintiff's Exhibit 46, NSF Proposal for Research Support, section entitled "Previous Work of this Investigator," and Plaintiff's Exhibit 68, Entitled "Byproducts of Aversive Control." Senator Proxmire in his press release made no mention of this finding.

The tenth finding which we have reported is that we have perfected automatic attack measuring instruments for the rapid and reliable detection of changes in aggression in direct, simultaneous comparison to other nonaggressive behaviors. Support for this statement can be found in Exhibit 55, "Causes and Control of Aggression in Man." Additional support may be found in Exhibit 76 entitled "Effects of Long-Term Shock and Associated Stimulae on Aggressive and Manual Responses." Senator Proxmire in his press release makes no mention of this finding.

The eleventh finding which we have obtained is the development and extensive testing of a method for the accurate and reliable detection of anger and the probability

of attack by humans which employs standard laboratory instruments. Confirmation for this statement may be found in Exhibit 62 entitled "Progress Report to the National Aeronautics and Space Administration;" supplement entitled "The Laboratory Measurement of Human Anger;" and in Plaintiff's Exhibit 49 Section entitled "Previous Work of this Investigator." Senator Proxmire makes no mention of this finding in his press release.

The twelfth finding which we have reported is that certain procedures can be used to change the environment to reduce the effect of stress, thus reducing aggressive behavior. Support for this statement can be found in Plaintiff's Exhibit 52 entitled "The Development of Sustained Attack Behavior" and Plaintiff's Exhibit 76 entitled "Effects of Long-Term Shock and Associated Stimulae on Aggressive and Manual Responses." Senator Proxmire has made no mention of this finding in his press release.

Our thirteenth area of research has discovered how drugs may be used to reduce aggression and produce increases in attention to and successful coping with stressful environmental conditions. Support for this statement can be found in Exhibit 73, entitled "The Basis of Behavioral Influence of Tranquilizers" and further support may be found in Exhibit 56, entitled ONR Proposal for Funding, Section "Technical Description of Proposed Work." Senator Proxmire has made no mention of this finding in his press release. By failure to describe goals, purposes, general findings, and benefits of this research effort the Senator has misinformed his audience and created an impression of purposeless, disorganized and chaotic work.

B. *What It Falsely Says.*

In the first paragraph of the Senator's press release, he concludes from the findings of these studies that it is

clear that the government paid a half million dollars to find out that anger, stopping smoking and loud noises produce jaw clenching in people. As previously noted, the Federal Government has been informed of at least 13 general conclusions, each based on many separate experiments. Reference to grant proposal documents, progress reports, and published technical and review articles demonstrates that the government's expenditure of one half million dollars paid for far more research, effectively organized around general principles producing coherent general findings. Support for this statement may be found in examination of Plaintiff's Exhibits 64-96, published technical articles and review papers and in the section of the grant proposals entitled "Previous Work of this Investigator", Plaintiff's Exhibits 46-63. Additionally, it should be noted that experiments which discovered that cessation of smoking by smokers produced increased aggressivity was paid for by private funds, and not by the Federal Government.

The first sentence of paragraph three of Senator Proxmire's Press Release says "all this money was given to Roland R. Hutchinson of the Kalamazoo State Hospital in Michigan." This is not true. All funds were remitted to, dispersed by, and accounted for by agencies of the State of Michigan, either Western Michigan University or Fort Custer State Home, or Kalamazoo State Hospital of the Department of Mental Health of Michigan. I could request authority to purchase supplies, equipment or personnel, but actual purchase orders and payroll vouchers were authorized by departments of the institution independent in all ways of the research program. Additionally, all of these funds (except for approximately $15,000) during the entire period were utilized to defray expenses of the research such as supplies, equipment, and personnel other than myself. The State of Michigan was, while I

was at Western Michigan University, reimbursed through federal grants for approximately $15,000 of summer salary paid by the University to me for summer work during the 1967-1970 period.

Additionally, it may be noted that my name is Ronald and not Roland as the Senator reports.

In the fourth paragraph of the press release, Senator Proxmire states "Dr. Hutchinson told NASA that people get angry when they feel cheated and tend to clench their jaws or even scream and kick." This is not a true statement of my report to the National Aeronautics and Space Administration. Plaintiff's Exhibits 59-63 present the research proposal and progress reports over the years of funding to the National Aeronautics and Space Administration. It may be seen by reference to Exhibit 59 that the proposed research to NASA included 11 separate experiments. Additionally, in the successive project reports and in the addenda to several of these reports entitled "The Laboratory Measurement of Human Anger" the exact nature and extent of my findings is reported. In the prepublication entitled "The Laboratory Measurement of Human Anger," we report six separate experimental sequences. The abstract of this technical article succinctly describes the experiment performed and the findings obtained. Further, each of the introductory sections describes the logical purpose and experimental intent for each experiment. Finally, the discussion at the end of each experiment and the general discussion at the end of the entire paper describes the findings of this research in detail. Senator Proxmire has not mentioned any of the goals, purposes, or general statements of findings, as reported in this major summary paper. Instead, he has stated that we told NASA that people clench their jaws when they feel cheated. We did not say this and it in any event would be inaccurate

to describe our work in such terms. In fact, we discovered that people become aggressive when they encounter occasions of reduced monetary delivery; this in spite of the fact that they have been told in the introduction to the experiment that such conditions would occasionally prevail. See for example page 24, paragraph 1, 2 for support for this statement.

In the second sentence of paragraph four, Senator Proxmire states, "NSF learned that Dr. Hutchinson's monkeys became angry when they were shocked and would try to get away from the shock. In addition, NSF was informed that drunk monkeys do not usually react as quickly or as often as sober monkeys and that hungry monkeys get angry more quickly than well fed monkeys." This paragraph is also cited on page 41 of Defendant Proxmire's Brief. The claim is made that this statement is borne out by reference to Exhibit 69. The claim is false as shown by the following. First Exhibit 69 as presented is incomplete. Rather than the three page document Defendant Proxmire presents, the entire report as submitted included 17 pages. The full report is shown as the last section of Plaintiff's Exhibit 49, and includes a two-page budget, four pages of text, a reference page and ten pages of technical graphs and illustrations. In that document, I present first a five-paragraph overview of the work as necessary to introduce the relevance of the particular specific findings discussed in the remaining paragraphs and in technical illustrations. Beginning with the sixth paragraph, I discuss specific findings and cite specific figures to illustrate these points.

Briefly I say that I have found:

1. Propranolol (a drug) when injected, causes aggressive reactions to be increased slightly while simultaneously decreasing avoidance and escape reactions. Figure 2 is cited.

2. Phentolamine (another drug) decreases both aggression and avoidance-escape responses. (figure 3)

3. Atropine (another drug) reduces both aggression and escape avoidance response, though at intermediate doses the latter are more affected (Figure 4)

4. Insulin (another drug) causes marked increases in escape-avoidance compared to aggression (Figure 5)

5. The introduction of stress causes a marked shift in preference to alcohol vs. water (Figure 6)

6. Noxious stimulation directly causes a subject to take in large quantities of fluid (Figure 7).

7. The patterns of aggressive and escape-avoidance type reactions are similar for primates and humans (Figures 8, 9, 10) and these findings allow greater confidence in new testing methods.

Each of these specific findings are then discussed as they relate to one another and to other earlier findings. Additionally, the relevance and possible application of the findings are discussed.

Consider now how the Senator has described these findings. "NSF learned that monkeys become angry when they are shocked and would try to get away from the shock." This statement by Defendant Proxmire is totally unrelated to our statements of findings unless perhaps he is referring to statements in the second paragraph. That general statement by me, referring to work accomplished years previously with other funds. However, I have elaborated on this paragraph in paragraph one which says "Methods have been developed for the *simultaneous assay*

of *three* basic and separate motoric processes in several species including monkeys and man." I am describing the capability of *simultaneously testing* several behavioral processes very important for measuring the specific effect of a drug, as was stated in the next background paragraph. As stated, the Senator's comment makes it appear that I discovered the obvious.

The Senator's next statement says "In addition NSF was informed that drunk monkeys do not usually react as quickly or as often as sober monkeys. . . ."

To what could the Senator possibly be referring? In figure 1 and in introductory paragraph four of my report, Alcohol is shown to cause *less* of a *decrement* in aggression than escape-avoidance processes leaving a subject relatively more aggressive, quite the reverse of the Senator's statement. The way he has stated it makes it appear that I reported the obvious to NSF. Of course, he failed to note that we had discovered how stress can cause alcohol drinking by monkeys—something I did in fact find and reported to NSF (figure 6).

Finally, the Senator concluded by saying "that hungry monkeys get angry more quickly than well fed monkeys." Again, he makes it appear that I reported the obvious to NSF. Where could he possibly have thought he saw such a finding?

In the last paragraph of the second page, I stated "Over the last several years our work has recurrently shown that feeding schedule and food deprivation have pronounced affects upon emotional tendencies. *Until recently, we have not been in a position to assay precisely these effects.* During the past year. . . ." I then went on to describe that insulin administration caused "marked and differential increases in escape and flight tendencies while

having little effect until higher doses upon anger and aggressivity." Thus, what I actually reported was that insulin caused a *differential* increase in *nonaggressive* reactions.

In each and every case, the Senator has misstated my findings, typically reversed them, and falsely stated that I reported the obvious to NSF.

A final comment on this material is relevant. Note that the designation "Privileged Communication" is typed at the top of each page of the report. This is to alert the agency that the majority of the material has not yet been published and is therefore not to be released, a proper and normal request and routinely honored by agencies for such material disclosed in an interim progress report such as the present report.

Note that on Defendant's Exhibit 69, the "privileged communication" statements have been taped over.

In paragraph six of the press release, Senator Proxmire says "It is very interesting to trace the history of these extremely similar and perhaps duplicative projects." In the remainder of paragraph 6, 7, 8 the Senator makes recurrent statements and paraphrase the titles of several grants to create the impression that several agencies provided funds to conduct the same experiments. This is untrue. Inspection of each proposal shows that separate, unique experiments were suggested by us.

In the third sentence of paragraph 6, the Senator says "for two years Dr. Hutchinson studied the biting reactions of monkeys when they received electric shock." This statement fails to describe even minimally the breadth and depth of experiments conducted during that two-year period for the National Science Foundation. Reference

to Plaintiff's Exhibit 46 demonstrates five separate sections to the research being conducted. Pages 2-6 of the same exhibit enumerate and specify the variety of conditions to be tested.

In sentence four of paragraph six, Senator Proxmire states "he also compared their reactions while being given a number of different drugs such as alcohol and caffeine." This statement is untrue. Reference is made to pages 2-6 of exhibit 46, the research proposal to the National Science Foundation, and pages 1-6 of the progress report for the one-year period 1968, and the statement of progress in the renewal proposal to National Science Foundation, Exhibit 47.

In sentence five of paragraph six of the press release, the Senator states "in 1969 the NSF gave Dr. Hutchinson another $26,300 to continue these experiments. The implication that the same research proposed in 1967 was being given additional funds and that no new experiments were proposed is false. A comparison of the research proposed on pages 2-6 of Exhibit 46 and the research proposed on pages 4-11 of Exhibit 47 shows that separate and additional experiments were proposed and actually funded.

In the ninth paragraph of the press release, Senator Proxmire states in the first sentence "Dr. Hutchinson, who in addition to being Research Director at Kalamazoo State Hospital, is also an adjunct Professor at Western Michigan University and President of his own non-profit foundation for Behavior Research. . . ." Several inaccuracies in this statement may be noted. During the period in question and for the year previous to the release of this statement, I had not been affiliated with the Western Michigan University. Additionally, the non-profit foundation with which I am affiliated is entitled the Foundation for Behavioral Research.

In paragraph 11, sentence two, of the press release, Senator Proxmire states "in fact, the good doctor has made a fortune from his monkeys and in the process made a monkey out of the American taxpayer." This statement is false. First, I have not made a fortune from my research. As pointed out above, I have always been paid by the State of Michigan or one of its agencies. In the total period of research described by Defendant Proxmire's press release, I received a total of less than $15,000 in salary from the State of Michigan for summer research efforts over a four year period which was reimbursed from grant funds. Actually, the State of Michigan through one of its agencies, the Western Michigan University or the Michigan Department of Mental Health, actually released my time to conduct this research and thereby provided funds from its general revenues to these federal projects of approximately $100,000.

5. *Other Publications.*

I have reviewed the May, 1975 newsletter sent out by Senator Proxmire, the February, 1976 newsletter, the transcript of the Mike Douglas Show, and the summary of the Bob Barry Show. In each of these publications, Senator Proxmire has inaccurately, superficiously and falsely described my work in the two manners discussed in paragraph four above. First, the statements by Defendant Proxmire do not discuss the work that I have done as outlined in paragraph 4a. above. Secondly, the comments that are made by Senator Proxmire are false in that they inaccurately report the work done and findings obtained, as described in paragraph 4b. above.

6. I have discussed with my attorneys the possibility of taking the depositions of officials at the funding agencies (NSF, NASA, ONR and NIDA) to fully explore the cir-

cumstances surrounding the Defendant's contact with those agencies regarding my work, the informations released, the evaluations of my work, the evaluations of the statements made by the Defendants and other pertinent matters. I have considered the possible costs of taking the depositions in Washington, especially in view of the fact that the Defendant's legal expenses are being paid by the United States Senate (See Plaintiff's Exhibit 45) and he therefore has no incentive, as I do, to keep the legal expenses as low as possible. In view of the fact that my legal expenses have already exceeded my present ability to pay, and in view of my expectation of the great expense in taking the depositions in Washington, I have decided that I am not financially able to take the depositions at this early point in the litigation.

7. However, I have requested documents from the various agencies under the Freedom of Information Act. I hereby certify that the documents attached to this record as Plaintiff's Exhibits 13 through 31 are true and correct copies of some of the documents I have received from the federal agencies under the Freedom of Information Act.

8. I have maintained copies of the grant [research] proposals, project reports and other documents submitted to NSF, NASA, ONR and NIDA. Some of those documents are used as Exhibits to my Brief. I hereby certify that the documents provided as Plaintiff's Exhibits 46 through 96 are taken from my own records and are true and correct copies of the documents submitted to the agencies.

9. The news release issued by Senator Proxmire about April 18, 1975 resulted in newspaper stories in newspapers throughout the country. Some of the articles I have actually read and other articles have been mentioned

to me from time to time. I have maintained a file of some of those articles, and Plaintiff's Exhibits 32 through 43 are copies of such articles.

10. After publication of Senator Proxmire's news release of April 18, 1975, I received some mail. Plaintiff's Exhibit 44 is some of the hate letters I received.

11. In Section II-B of his Brief, Defendant Proxmire states that I was a "public official" because of my position at the Kalamazoo State Hospital. In fact, my power and authority at the hospital were very limited. I did not possess the power to personally hire or fire any subordinates. I did not and could not participate in any institution-wide administrative meetings, I lacked any program planning authority for directing the policies of the institution. Moreover, I had direct control over only ten or eleven employees, some of whom were only students working part time. At no time during my employment at Kalamazoo State Hospital did I exercise control over more than 19 employees. Consequently, I occupied a position of authority lesser than such other hospital employees as the Director of Domestic Services, the Power Plant Supervisor, the Nursing Ward Supervisors and the Maintenance Supervisor. Furthermore, my position was created when I came to the hospital, and abolished as soon as I left.

12. In his Brief and in his defamatory statements, Defendant Proxmire has stated and implied that I have personally received large sums of public grant money. These statements are false. During the four years from 1967 through 1970, I received a total of less than $15,000. That amount represented reimbursements to Western Michigan University to help defray the cost of my summer salaries over the four years in question. From 1971 through 1975, I did not personally receive any federal

research funds at all. All of the grants were awarded to the State of Michigan and were administered by persons outside of my department. This money was dedicated exclusively to purchasing equipment and supplies and to paying the wages of researchers other than myself. Thus, it is totally inaccurate to state that I was the direct recipient of these research grant funds. In fact, during the period in question, the only public funds that I received were contained in my salary as a State employee in the Michigan Civil Service.

13. On page 35 of his Brief, the Defendant refers to certain newspaper announcements concerning me and my work. Most of these announcements were solicited by the News and Publications Department of Western Michigan University. Specifically, the University's Psychology Department actively solicited information which might reflect favorably on the Department and the University. To facilitate this solicitation, the Department provided special forms for reporting "any item of news about your work that may be of sufficient interest to pass on to the news and information service."

14. According to a memo written by Dr. Fred Stollnitz on April 14, 1975, Defendant Schwartz told Dr. Stollnitz that I had "applied eight times to NIMH and had been turned down every time." This statement is false. All of my proposals to NIMH have not, in fact, been rejected. On the contrary, at least three of my grant proposals have been approved. These included a fellowship grant for research at Yale University and two other research proposals submitted on May 29, 1966 and June 19, 1972. Eventually, I withdrew the 1966 proposal because it was funded by the National Science Foundation. This withdrawal, however, came after NIMH had approved my proposal.

15. I believe that my experience with the National Science Foundation indicates the effect of the Defendant's interference with my contractual relations. Prior to being "fleeced" by the Defendant, I had submitted five research proposals to NSF for projects in which I was to be the principal investigator. Of these five proposals, four were approved. Subsequent to being fleeced, I have submitted two proposals to NSF, both of which have been rejected.

16. In my Amended Complaint, I have charged the Defendant with intentional infliction of mental anguish. There are many facts to support this claim. Specifically, I have experienced sleeplessness, high-blood pressure requiring medication, neurological problems in my left arm and leg, recurrent upset stomach, periods of withdrawal, embarrassment among my family, friends, colleagues and neighbors, a reversion to smoking after a five year period of abstinence, and a mental preoccupation which has interfered with my creative capacity. Furthermore, I have experienced great mental anguish upon the receipt of various items of "hate mail" which has been sent to me as a result of Defendant Proxmire's defamatory publicity.

Further Deponent sayeth not.

/s/ Ronald R. Hutchinson
Ronald R. Hutchinson

Subscribed and sworn to before me this 17th day of November, 1976.

/s/ Debra L. Fausett Miller
Debra L. Fausett Miller
Notary Public
Ingham County, Michigan

My Commission Expires: 6/13/77

AFFIDAVIT OF RICHARD SHANNON, DECEMBER 1, 1976, PLAINTIFF'S TRIAL EXHIBIT 7, U.S. D.C., WESTERN DIST. OF WISC.

STATE OF WISCONSIN)
: ss.
COUNTY OF MILWAUKEE)

RICHARD SHANNON, being first duly sworn, states:

1. I am the producer of the "Bob Barry Show." The "Bob Barry Show" is a morning radio show aired in Milwaukee, Wisconsin. The show consists of music and information. Records are played, the news is given, traffic reports are given and four telephone interviews are conducted during each show. On June 17, 1975, the "Bob Barry Show" was carried by WOKY Radio, Milwaukee, Wisconsin. The show is now carried by WEMP Radio, Milwaukee, Wisconsin.

2. On June 17, 1975, Senator William Proxmire was one of the persons interviewed on the "Bob Barry Show." On this show, Senator Proxmire discussed Dr. Rolland R. Hutchinson and the grants he received from the National Science Foundation, the National Aeronautics and Space Administration and Office of Naval Research, to study why rats, monkeys and humans clench their teeth. At the conclusion of each show, I summarize each of the interviews and keep a record of the summaries. Attached to this Affidavit as Attachment 1 is the Summary of the June 17, 1975 show that I prepared after the show and maintained in my records. Item number three is my summary of the interview with Senator Proxmire.

3. Attached to this Affidavit as Attachment 2 is a copy of a newspaper article from the National Tattler regarding Dr. Rolland R. Hutchinson and the funding of

his research work. This article is also taken from my file of the records of the June 17, 1975 show. This National Tattler article was used by me and by Bob Barry to formulate questions for Senator Proxmire on the June 17, 1975 show.

4. Normally, we keep tapes of the "Bob Barry Show." However, a tape of the June 17, 1975 show does not exist because of technical problems in taping it.

/s/ Richard W. Shannon
Richard W. Shannon

Subscribed and sworn to before me, a Notary Public, this 1st day of December, 1976.

/s/ (Illegible)
Notary Public, Milwaukee County, Wisconsin.

My Commission Expires: 2-17-80

APPLICATIONS FOR FEDERAL RESEARCH GRANTS BY OR UNDER THE DIRECTION OF RONALD HUTCHINSON, DEFENDANTS' TRIAL EXHIBIT 82B, U.S. D.C., WESTERN DIST. OF WISC.

AGENCY	DATE OF APPL. DATE REQUESTED	TITLE	YEARS OF PERFORMANCE	$ TOTAL	DATE OF REJECTION
HEW (Public Health Service)	6/24/76	Analysis & Chemical Control of Negative Effect	6/1/76 - 5/31/78	10,162	
HEW (Public Health Service)	3/1/76	Noxious Stimulus Caused Attack & Alcohol Intake	10/1/76 - 9/30/79	109,996	
HEW (P.H.S.) Nat'l. Inst. of Mental Health	1/29/76	Noxious Stimulus Caused Attack - Escape & Drug Intake	11/1/76 - 10/31/81	155,250	Pending - ltr. 6/25/76
HEW (P.H.S.)	5/14/75	Evaluation of Drugs of Abuse on Aggressive Behavior	1/1/76 - 12/31/78	130,224	
HEW (P.H.S.)	3/27/75	Environmental & Drug Effects on Attack & Drinking	11/1/75 - 10/31/78	76,091	
HEW (Nat. Inst. on Drug Abuse)	No Appl. Attached	Evaluation of Cocaine on Aggressive Behavior - 6 mo. continuation of ADM-45-74-163	* According to other applications, this proposal was accepted & support was given for 6/28/74 - 6/27/75		
HEW (P.H.S.)	6/15/73	Analysis & Chemical Control of Negative Affect	11/1/73 - 10/31/76	90,596	
HEW (P.H.S.)	9/28/73	Measurement of Jaw Clenching During Experimental Stress	5/1/74 - 4/30/76	77,203	
HEW (P.H.S.)	9/28/73	Aggression & CNS Reward-Aversion Systems	5/1/74 - 4/30/77	62,877	
HEW (P.H.S.)	9/27/72	Drug Effects Upon Hyprocarnal EEG & Behavior	5/1/73 - 4/30/75	33,114	
HEW (P.H.S.)	9/20/72	Relationships Between Amygdaloid EEG & Behavior	5/1/73 - 4/30/76	63,220	
HEW (P.H.S.)	9/20/72	Effects of Chemical Brain Stimulation on Aggression	5/1/73 - 4/30/75	30,692	

2.

AGENCY	DATE OF APPL. DATE REQUESTED	TITLE	YEARS OF PERFORMANCE	$ TOTAL	DATE OF REJECTION
HEW (P.H.S.)	1/26/72	Environmental Causes of Aggression (Attached is a proposal for research on same subject) Renewal req. for Grant GB-18413 - desired starting date 2/1/72	9/1/72 - 8/31/75	95,759	
HEW (P.H.S.)	1/23/71	Epileptogenic Properties of the Amygdaloid Complex	9/1/71 - 8/31/73	56,944	
HEW (P.H.S.)	9/28/70	Neural Controls Over Aggressive Behavior	5/1/71 - 4/30/74	46,521	
HEW (P.H.S.)	6/29/70	Attack Behavior in Encephale Isole Preparation	1/1/71 - 12/31/71	4,973	
HEW (P.H.S.)	9/20/68	Environmental & Physiological Causes of Aggression (Attached are 3 proposals on same subject) Desired starting dates: 1/1/67; 1/1/70; 2/1/72	1/1/69 - 12/31/74	166,274 + indirect costs	
HEW (P.H.S.)	9/29/69	Aggression in Animals & Man	3/1/70 - 2/28/75	172,779 + indirect costs	
HEW (P.H.S.)	2/26/68	Effects of Non-Contingent Reward & Punishment (Attached is proposal on same subject) desired starting date: 9/1/67	5/1/68 - 4/30/69	5,981	
HEW (P.H.S.)	9/20/63	Aggressive & Avoidant Reactions to Aversive Stimuli	9/1/64 - 8/31/65	27,413	
NASA	12/5/75 11/15/74 12/1/73 10/20/72 Undated initial proposal	The Measurement & Facilitation of Cooperative Task Performance No application - series of 5 proposals - initial proposal and 4 requests for continuations	2/1/76 - 1/31/77 2/1/75 - 1/31/76 2/1/74 - 1/31/74 1/1/73 - 12/31/73 7/1/71 - 6/30/72	25,003 34,999 not mentioned " "	Applicant did receive NASA support for at least some of these proposals according to other applications
Office of Criminal Justice Programs	8/20/70	Effects of Marijuana & Amphetamines on Human Aggression	10/70 - 10/71	21,600	

3.

AGENCY	DATE OF APPL. DATE REQUESTED	TITLE	YEARS OF PERFORMANCE	$ TOTAL	DATE OF REJECTION
Nat. Science Foundation	5/7/76	Noxious Stimulus Caused Attack & Alcohol Intake	1/1/77 - 1/1/80	166,760	
NSF	10/4/72	The Effects of Delta-1-THC on Aggression & Escape	4/1/73 - 3/30/75	35,984	
NSF	4/6/71	Epileptogenic Properties of the Amygdaloid Complex	9/1/74 - 8/31/76	64,983	
Dept. of Defense		The Contingent Control of Human Anger			3/72
AMA - Ed. & Research Found.	3/24/72	The Laboratory Analysis of the Stress Reductant & Correlated Abuse Potential of Drugs	5/1/72 - 4/30/75	91,568	
AMA	8/27/70	Psychophysiological Aspects Cigarette Deprivation	12/1/70 - 11/31/72	28,719	
Nat. Safety Council	12/1/69	Determinants & Reductants of Human Aggression			
The Council for Tobacco Research USA Inc.	7/13/76	Effects of Acute & Chronic Nicotine Administration Upon Aggression & Blood Pressure Reactions in Rats & Humans	1/1/77 - 12/31/79	106,663	
"	9/22/72	The Blood Pressure Reductant Effect of Nicotine	1/1/73 - 12/31/73	14,030	
		The Development of Sustained Attack Behavior	3/1/68 - 2/28/71	73,975	According to another appl. he received support from the ONR for this project
DOT/FAA	5/14/76	Laboratory Studies of Effects of Various Recorded Flyover Noises on Listeners		110,124	

4.

AGENCY	DATE OF APPL. DATE REQUESTED	TITLE	YEARS OF PERFORMANCE	$ TOTAL	DATE OF REJECTION
DOT	5/19/76	Pharmokenetics of Drug Effects on Driving Performance (attached proposal dtd. 5/21/71)	3 yrs.	547,020	
Unidentified		Effect of Cigarette Smoking Interruption & Resumption on Aggression Levels in Humans	(Attachment states "Philip Morris approved 12/69")		
Unidentified	4 proposals	Causes & Control of Aggression in Man	1/1/74 - 12/31/74 3/1/73 - 12/31/73 3/1/72 - 2/28/73 3/1/71 - 2/28/74		

Applications for U.S. Funding, TOTAL ESTIMATE $4,738,822

(Exhibits b & c)

MISSING APPLICATIONS AND PORTIONS THEREOF, DEFENDANTS' TRIAL EXHIBIT 82C, U.S. D.C., WESTERN DIST. OF WISC.

Agency	Name (or #) + Dates (if any)	$ Amount + date Submitted (S) or Rejected (R)	Missing Portions
HEW	Environmental & Physiological Causes of Aggression	144,285 6/1/66 (S)	All
HEW	(No name known)	152,017 2/8/67	All
ONR	The Development of Sustained Attack Behavior (included in Req. 10 as an approved contract)	77,586 2/68 (S) 2/2/68 (R)	
NSF	Amygdaloid EEG-Behavior Relationship	76,381 3/1/73 (S) 3/8/73 (R)	All
NSF	The Effects of Chemical Brain Stimulation on Aggressive Behavior	37,137 9/26/72 (S) 3/8/73 (R)	All
NSF	Drug Effects Upon Hippocampal EEG and Behavior	39,127 3/1/73 - 75	All
NSF	Aggression & CNS Reward Aversion System	62,877 5/1/74 - 77 10/73 (S) 2/13/74 (R)	All
NSF	Environmental & Physiological Causes of Aggression	1/70 - 12/72	All
ONR	The Measurement & Facilitation of Cooperative Task Performance	85,851 9/71 - 6/72 5/17/71 (R) 4/71 (S)	Rejection
NSF	Environmental & Physiological Causes of Aggression	120,611 2/1/72 - 1/31/75 8/23/71 (S) 11/15/71 (R)	All
NSF	Environmental Causes of and Pharmacological Influence Upon Aggression in Man	114,723 11/1/75 - 10/31/78 11/20/75 (R)	All
NIDA	Pharmokinetics of Drug Effects on Driving	547,020 5/21/76 (3 yrs)	All
NIH	Epileptogenic Properties of the Amygdaloid Complex	59,944 9/71 - 8/73	All
NIH	Effects of Noncontingent Reinforcement & Punishment	152,017 9/67 - 8/72	Total Appl. w/$ amount
HEW	Analysis of Noxious Stimulus Produced by Alcohol Intake	82,971 5/74 - 4/77 9/28/73 (S)	All
NIMH	Aggression & CNS Award Aversion Systems (Critique 3/22/74)	62,877 5/74 - 77	Critique
NIH	Aggression in Animals & Man (Critique 6/30/70)	180,891 1/70 - 75 6/29/70 (R)	Critique & Rejection

- 2 -

Agency	Name (or #) + Dates (if any)	$ Amount + Date Submitted (S) or Rejected (R)	Missing Portions
	Physiological Changes During Conflict	5,050	All
Phillip Morris	Effect of Cigarette Smoking Interruption & Resumption or Aggression Levels in Humans		Appl. & $ amt.
NASA	The Measurement & Facilitation of Cooperative Task Performance		Appl. & $ amt.
DOD	The Contingent Control of Human Anger	3/72 (R)	Appl. & $ amt.
ONR	Causes & Control of Aggression in Man		Appl. & $ amt.

RONALD R. HUTCHINSON CONTRACTS AND GRANTS WITH U.S. AGENCIES, DEFENDANTS' TRIAL EXHIBIT 83, U.S. D.C., WESTERN DIST. OF WISC.

Agency	Dates	Title	Contract No.	Amount
NSF	1-67 - 1-69	Environmental & Psysiological Causes of Agression	B70194R	40,000
NSF	10-69 - 1-31-72	Environmental & Physiological Causes of Agression	GB18413	51,200
NSF	1-68 - 2-69		GB5980	44,700
NSF	2-69 - 1-31-70		GB8535	26,300 4,700
NSF	5-72 - 10-75	Enviornmental Causes of Agression	BMS72-0218 (formerly GB-33620X)	51,800
NASA	1968 - 1970	Basic Animal Research		34-40,000
NASA	2-72 - 8-72	The Measurement & Facilitation of Cooperative Task Performance	NGR23-014-002	40,000
NASA	8-72 - 2-73		Supp #1	36,000
NASA	2-73 - 2-74		Supp #2	70,000
NASA	2-74 - 2-75		Supp #3	50,000
NASA	2-75 - 2-76		NSG2070	34,999
NASA	2-76 - 2-77		Supp. #1	25,003
ONR	3-69 - 3-70	Causes & Control of Human Aggression	N00014-69-C-0253	29,568
ONR	3-70 - 2-71		N00014-70-A	30,000
ONR	3-71 - 2-72		0183-001	34,960
ONR	3-72 - 2-73			37,957
ONR	3-73 - 2-74			40,172
ONR	3-74 - 2-75			34,829
ONR	2-75 - 8-75		PR-NR-201-068	29,955
NIDA	6-74 - 6-75	Evaluations of Cocaine on Agression	45-74-163	86,660
NIDA	6-75 - 12-75	Evaluations of Cocaine on Agression	271-75-3075	54,800
	3-76			11,338
NIMH	6-75 - 5-78	Analysis & Chemical Control of Negative Effect	G-1-R01	11,600
		Total U.S. Government Funds		$917,441

PUBLICATIONS BY RONALD R. HUTCHINSON SUPPORTED BY GOVERNMENT GRANTS, DEFENDANTS' TRIAL EXHIBIT 84, U.S. D.C., WESTERN DIST. OF WISC.

Date	Publication	Title of Article	Grant
Jan. 1968	Journal of the Experimental Analyses of Behavior (JEAB)	Effects of Shock Intensity & Duration on the Frequency of Biting Attack by Squirrel Monkeys	NSF - GB-5980 - Environmental & Physiological Causes of Aggression
Jul. 1968	JEAB	Attack Produced by Intermittent Reinforcement of a Concurrent Operant Response	NSF - GB5980
Sep. 1968	JEAB	Biting Attack by Rats in Response to Aversive Shock	NSF-GB5980
Summer 1970	Michigan Mental Health Research Bulletin (MMH)	Electrical Activity of the Amygdala & Hippocamus During Biting	NSF/ONR "Causes & Control of Aggression in Man"
Fall 1970	MMH	Aggression: Effects of Acute & Chronic Morphine	NSF/ONR
Spring 1971	MMH	The Behavioral Basis of Action of Tranquilizers	NSF/ONR
1971	APA "Proceedings".	Similar & Selective Actions of Chlorpromazine, Chloridazepoxide, & Nicotine on Shock-Produced Aggressive & Anticipatory Motor Responses in the Squirrel Monkey	NSF-18413 Environmental & Phys. Cause of Aggression NASA-NGR-23-014-001 "The Measurement & Facilitation of Cooperative Task Performance" ONR-N00014-70-A-0183-001 Causes & Control of Aggression in Man Phillip Morris
Winter 1971	MMH	Epileptiform Activity in the Basolateral Amygdala Related to Aggression	NSF ONR
Mar. 1971	JEAB	Effects of Long-Term Shock & Associated Stimuli on Aggressive & Manual Responses	NSF GB-5980 GB-8535 ONR N00014-69-C0253 NASA-NGR 23-010-004

Date	Publication	Title of Article	Grant
1972	Life Sciences Vol. II Pergamon Press	Basis of Behavioral Influence of Chlorpromazine	NSF GB-38413, GB-8535 NASA NGR 23-014-001 ONR N00014-70-A-0183-0001
1972	Physiology & Behavior, Vol. 9 Brain Research Publications Inc.	Electrographic Changes in the Amygdala & Hippocampus Associated w/Biting Attack	NSF 8535
1972	Schedule Effects Drugs, Drinking, & Aggression Voj Toronto Press	& Schedule Independent Factors Contributing to Schedule Induced Phenomena	ONR-N00014-70A-0183 NSF GB-18413 NASA NGR-23-010-004
1972	Nebraska Symposium on Motivation	The Environmental Causes of Aggression	NSF GB-18413 ONR N-00014-70-A-0183-0001 NASA - NGR-23-010-004
1973	Smoking Behavior, Motives & Incentives V.H. Winston	Effects of Nicotine on Avoidance, Conditioned Suppression & Aggression Response Measures in Animals & Man	ONR N00014-70-A-0183-0001 NASA NGR 23-010-004 NSF GB-18413 Phillip Morris

ORDER OF U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN GRANTING SUMMARY JUDGMENT TO MOTION OF DEFENDANT PROXMIRE, DECEMBER 23, 1976

Name of Presiding Judge,

Honorable GEORGE N. LEIGHTON

Cause No. 76 C 257 Date 12-23-76

Title of Cause RONALD R. HUTCHINSON v. WILLIAM PROXMIRE AND MORTON SCHWARTZ

Brief Statement of Motion Ruling on motion for summary judgment

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel .....

Representing .....

Names and Addresses of other counsel entitled to notice and names of parties they represent. .....

/s/ Leighton, J.

Reserve space below for notations by minute clerk

Motion of the defendant William Proximre to dismiss the plaintiff's suit, or in the alternative, for summary judgment. The ruling will be in the alternative motion for summary judgment under Rule 56, Federal Rules of Civil Procedure. On or before the 27th day of January 1977 the court will file a memorandum stating the reasons for its ruling. The order entered this day shall not be

final until the memo is filed, on said date summary judgment will be entered in favor of the defendant William Proxmire

Hand this memorandum to the Clerk.

Counsel will not rise to address the Court until motion has been called.

ORDER EXTENDING TIME FOR FILING OF OPINION IN SUPPORT OF GRANT OF SUMMARY JUDGMENT MOTION OF DEFENDANT PROXMIRE, U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN, JANUARY 27, 1977

Name of Presiding Judge,

Honorable GEORGE N. LEIGHTON

Cause No. 76 C 257 Date 1-27-77

Title of Cause RONALD R. HUTCHINSON v. WILLIAM PROXMIRE AND MORTON SCHWARTZ

Brief Statement of Motion Order

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel .....

Representing .....

Names and Addresses of other counsel entitled to notice and names of parties they represent .....

/s/ Leighton, J.

Reserve space below for notations by minute clerk

On motion of the court, the date for the filing of the court's Memorandum is extended to on or before April 27, 1977. (see order for complete details)

Hand this memorandum to the Clerk.

Counsel will not rise to address the Court until motion has been called.

RULING OF JUDGE LEIGHTON, U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN, GRANTING SUMMARY JUDGMENT MOTION OF DEFENDANT PROXMIRE, APRIL 22, 1977

Name of Presiding Judge,

Honorable George N. Leighton

Cause No. 76-C-257 Date April 22, 1977

Title of Cause Ronald R. Hutchinson v. William Proxmire and Morton Schwartz

Brief Statement of Motion Ruling on Motion for Summary Judgment

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel .....

Representing .....

Names and Addresses of other counsel entitled to notice and names of parties they represent. .....

/s/ Leighton, J.

Reserve space below for notations by minute clerk

In accordance with the Memorandum of the court filed this day, Summary Judgment is entered in favor of defendant Senator William Proxmire and against the plaintiff Dr. Ronald R. Hutchinson. Plaintiff is served notice that within 30 days, on its initiative, the court will dismiss this suit as to the remaining defendant Morton Schwartz unless plaintiff makes a showing within that time that such dismissal should not be ordered

Hand this memorandum to the Clerk.

Counsel will not rise to address the Court until motion has been called.

OPINION OF JUDGE LEIGHTON

Opinion of Judge Leighton, U. S. District Court for the Western District of Wisconsin, Granting Summary Judgment Motion of Defendant Proxmire, Including the Appendix thereto, Dated April 22, 1977, may be found at pages 26 through 67 of the Petition for Writ of Certiorari.

MEMORANDUM OPINION OF JUDGE LEIGHTON, U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN, DISMISSING ACTION AS TO DEFENDANT SCHWARTZ, JUNE 22, 1977

Name of Presiding Judge, Honorable George N. Leighton, sitting by designation in the Western District of Wisconsin

Cause No. 76 C 257 Date 6-22-77

Title of Cause Ronald R. Hutchinson v. William Proxmire and Morton Schwartz

Brief Statement of Motion Motion to Dismiss as to Defendant Morton Schwartz

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel .....

Representing .....

Names and Addresses of other counsel entitled to notice and names of parties they represent. .....

/s/ Leighton, J.

Reserve space below for notations by minute clerk

In the memorandum filed in this cause on April 22, 1977, this court notified plaintiff that it was considering dismissing the suit as to defendant Schwartz because on the facts alleged a claim had not been made on which relief could be granted. Plaintiff has filed a memorandum opposing the dismissal. Defendant Schwartz has filed an answer to plaintiff's opposition. Plaintiff has filed a reply to defendant Schwartz' answer. After consideration of the parties' statements, the court finds that the amended complaint fails to state a claim on which relief can be granted against defendant Schwartz. Therefore, the suit is dismissed.

Hand this memorandum to the Clerk.

Counsel will not rise to address the Court until motion has been called.

JUDGMENT OF U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN, JULY 7, 1977

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CIVIL ACTION FILE NO. 76-C-257

Ronald R. Hutchinson,
Plaintiff,

vs.

William Proxmire and Morton Schwartz,
Defendants.

JUDGMENT

This action came on for (hearing) before the Court, Honorable George N. Leighton, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that this action is hereby dismissed with prejudice and with costs to the defendants.

Dated at Madison, Wisconsin, this 7th day of July, 1977.

/s/ (Illegible)
Clerk of Court

OPINION OF U.S. COURT OF APPEALS

Opinion of U.S. Court of Appeals for the Seventh Circuit, Including the Appendices thereto, Dated June 30, 1978, may be found at pages 68 through 88 of the Petition for Writ of Certiorari.

JUDGMENT, U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT AFFIRMING THE DECISION OF THE U.S. COURT FOR THE WESTERN DISTRICT OF WISCONSIN, JUNE 30, 1978

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 30, 1978.

Before
Hon. LATHAM CASTLE, Senior Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. WILLIAM G. EAST, Senior District Judge*

Nos. 77-1677 & 77-1755

RONALD R. HUTCHINSON,
Plaintiff-Appellant,

vs.

WILLIAM PROXMIRE and MORTON SCHWARTZ,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Wisconsin.
No. 76-C-257

GEORGE N. LEIGHTON, Judge

These causes came on to be heard on the transcript of the record from the United States District Court for the Western District of Wisconsin, and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgments of the said District Court in this cause appealed from be, and the same are hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

---

*Honorable William G. East, Senior United States District Judge for the District of Oregon, is sitting by designation.

ORDER, U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT, DENYING PETITION FOR REHEARING AND EN BANC, JULY 26, 1978

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago Illinois 60604

July 26, 1978.

Before
Hon. LATHAM CASTLE, Senior Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. WILLIAM G. EAST, Senior District Judge*

Nos. 77-1677 and 77-1755

RONALD R. HUTCHINSON,
Plaintiff-Appellant,

vs.

WILLIAM PROXMIRE and MORTON SCHWARTZ,
Defendants-Appellees.

Appeals from the United States District Court for the Western District of Wisconsin.
No. 76-C-257

George N. Leighton, Judge

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by counsel for the appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

---

*Hon. William G. East, Senior District Judge for the District of Oregon, is sitting by designation.

Supreme Court, U. S.
FILED
NOV 22 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-680

RONALD R. HUTCHINSON, *Petitioner,*

v.

WILLIAM PROXMIRE and MORTON SCHWARTZ,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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November 22, 1978

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-680

RONALD R. HUTCHINSON, *Petitioner,*

v.

WILLIAM PROXMIRE and MORTON SCHWARTZ,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

QUESTIONS PRESENTED

(1) Under the Speech or Debate Clause, may a United States Senator criticize public spending in Congressional statements repeated in a press release and discussed in constituent newsletters without being subject to suit by the recipient of that spending?

(2) Did the Court of Appeals err in finding that oversight by a United States Senator and his aide into the extent and justification of agency spending over which the Senator has jurisdiction is not

legitimate legislative activity, immune from question under the Speech or Debate Clause?

(3) Does an individual who voluntarily seeks and obtains large amounts of public funding for research projects initiated and controlled by himself, and who invites public attention through publication of numerous articles and interviews, become a "public figure" or "public official" for purposes of discussing public funding of his work?

(4) Did the Court of Appeals err in finding in the absence of a clear showing of malice that Senator Proxmire and his aide Morton Schwartz were entitled to summary judgment for criticism of public spending in financing government research?

STATEMENT OF THE CASE

The facts pertinent to this Court's consideration are, in Respondents' view, adequately set forth in the opinions below, by Judge Leighton in the District Court and by Judge Castle for the Seventh Court of Appeals, and will not be restated here.

REASONS FOR DENYING THE WRIT

1. The Court Properly Resolved the Issues of Speech or Debate Immunity for Congressional Distribution of Information as Required by *Doe* v. *McMillan*.

In attempting to overturn the Seventh Circuit's holding that Senator Proxmire's criticism of public spending in newsletters and a press release was legitimate legislative activity pursuant to the "informing function" of Congress, Petitioner has sought to make the decision of the Court of Appeals here and those of this

Court in the past appear more absolute than is proper. Thus, the Seventh Circuit's holding is portrayed as immunizing *all* newsletters and press releases irrespective of content[1] at the same time it supposedly acknowledges that no part of the informing function is proper *legislative* activity,[2] while the language of this Court in *United States* v. *Brewster,* 408 U.S. 306 (1972) is read without reference to *Doe* v. *McMillan,* 412 U.S. 306 (1973) to hold firmly that no use of a press release or newsletter can possibly be immune.[3] Aided by these unfettered interpretations, a conflict is suggested to exist in the judiciary concerning the proper scope of the Speech or Debate Clause. The opinion of the Seventh Circuit here represents nothing more than a careful application of the principles enunciated in *Doe* v. *McMillan* that public distribution of information by a member of Congress *may* fulfill legitimate functions and thus be protected by the Speech or Debate Clause, dependent upon the nature and scope of the distribution and the Congressional purpose to be served.[4]

---

[1] Petition at p. 24.

[2] Petition at p. 16.

[3] Petition at p. 15.

[4] The issue confronted in *Doe* was whether informing the public about the business of Congress, if authorized by Congress, "must *always* be considered 'an integral part of the deliberative and communicative process . . .'" *id.*, 412 U.S. at 314 (emphasis added). This Court answered no and directed a case by case analysis of whether any particular act of informing the public exceeded the legitimate needs of Congress. This directive has not bred confusion in the lower courts, as Petitioner suggests now exists, but has been aptly applied without conflict—first on remand in *Doe* v. *McMillan*, 566 F.2d 713 (D.C. Cir. 1977) *cert. den.* 98 S.Ct. 1607 (1978), and now by the Seventh Circuit here. Other

The publications at issue in the present case, as the Seventh Circuit found and stressed, did nothing more than call attention to a Congressional statement in which Senator Proxmire had criticized federal agencies for what he considered wasteful use of public funds. Because control of appropriations for public expenditures is at the heart of the powers, and therefore the business, of Congress, and because such matters involve a great degree of interaction between the public and their elected representatives, the Seventh Circuit correctly concluded that this was a type of information "[that] would require greater public distribution to properly serve legislative needs." [5] Moreover, the manners of dissemination which the Court of Appeals held to be immune, a press release and constituent newsletters, are methods expressly authorized by Congress to be used in conveying such information to the public.[6] While Respondents do not argue that the

Speech or Debate Clause cases reaching this Court have been less concerned with this issue. *See McSurely* v. *McClellan*, 553 F.2d 1277 (D.C. Cir. 1976) (en banc) *cert. dismissed sub nom., McAdams* v. *McSurely*, 46 USLW 4878 (June 26, 1978) (No. 76-1621); *Davis* v. *Passman*, 571 F.2d 793 (5th Cir. 1978) (en banc) *cert. granted*, 47 USLW 3301 (Oct. 31, 1978) (No. 78-5072); *United States* v. *Helstoski*, 576 F.2d 511 (3rd Cir. 1978) *petition for cert. filed*, 47 USLW 3148 (Aug. 29, 1978) (No. 78-349).

[5] *Hutchison* v. *Proxmire*, 579 F.2d 1027, 1033 n.11 (7th Cir. 1978). Support for considering the nature of the information distributed as bearing on the extent of the distribution required is strongly presented by Justice Douglas' concurrence in *Doe* v. *McMillan*, representing three of the five Justices for the majority. See 412 U.S. at 330.

[6] The franking statute, 39 U.S.C. § 3210(2) declares it to be the Congressional intent that information about the legislative process and its functions pass between the public and its representatives, and § 3210(3) specifically authorizes the use of newsletters and

Congressional decision to publicize its business in certain ways thereby confers upon those who utilize those procedures Speech or Debate immunity, it is nevertheless clear that such Congressional authorization and intent is at least highly relevant to the judicial evaluation of the proper scope of the informing function.[7]

The soundness of the Seventh Circuit's evaluation is supported by consideration of the impact on Congress that a decision adverse to Senator Proxmire and his staff would have. Any claim that public spending is wasteful inevitably implicates criticism of those individuals involved or responsible for that spending. Should these individuals be allowed to debate the merits of public spending by institution of private libel suits, the very essence of Congressional business will become isolated from public discussion, and efforts to arouse colleagues or the citizenry about issues of national importance will be severely dampened. As the Court of Appeals correctly concluded, "If the inform-

press releases for this purpose. Congress, in honoring its commitment to keep its business open and public, Constitution, Art. I, § 5, has also established press galleries, and enacted legislation authorizing radio and television broadcast of Senate business (2 U.S.C. §§ 190a(b), 190a-1(a), 190h). This could presumably include direct coverage of such statements as that made by Senator Proxmire here. The House of Representatives has recently acted as well to authorize live gavel-to-gavel broadcasts of House proceedings, House Resolution 866, adopted October 27, 1977, which is scheduled to begin in January, 1979. Further, Congress has mandated that the Congressional Record, which contained the Senator's speech, be widely distributed among governmental agencies and the news media, 44 U.S.C. § 906, and be available for sale to the general public, 44 U.S.C. § 910.

[7] *Doe* v. *McMillan, supra*, Opinion of Justice Rehnquist, concurring in part and dissenting in part, 412 U.S. at 341-42.

ing function, even though limited, is to be accorded any absolute immunity, it must be in a case such as this."[8]

2. The Court Below Was Clearly Correct in Finding Respondents' Actions Privileged Under the First Amendment Where Plaintiff Is a Public Figure and the Record Evidences an Absence of Actual Malice.

In *New York Times* v. *Sullivan,* 376 U.S. 254 (1964), this Court strengthened the protection accorded discussion of public officials by prohibiting their recovery for defamatory falsehoods unless it could be clearly established that the statement challenged was made with actual malice, that is, "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-280. This same protection was extended to discussion of "public figures" in *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967). Applied to the present case, these principles clearly dictate the propriety of summary dismissal granted by Judge Leighton in the District Court and affirmed on appeal by the Seventh Circuit.[9]

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[8] 579 F.2d at 1033. In addition to its discussion of the informing function, the Court of Appeals interpreted the Speech or Debate Clause in the contexts of Congressional investigation and oversight of agency spending. While Respondents cannot agree with the Court of Appeal's conclusion that Mr. Schwartz' "follow-up" contacts with agency officials were not legitimate legislative activity, and have presented this issue to the Court's attention, review of that issue at this time would seem unwarranted. The Court of Appeals clearly held the same conduct to be privileged under the First Amendment, and unless it is reversed on that point, the review here would consist of Constitutional interpretation without the prospect that it would affect the judgment at issue.

[9] Judge Leighton found Plaintiff Hutchinson to be *both* a public official and a public figure. The Court of Appeals affirmed on the ground that Dr. Hutchinson was a public figure without reaching the second issue.

Petitioner seeks review by claiming that the Court of Appeals was in error in its public figure determination because it "essentially rejected the standards enunciated in *Gertz* v. *Welch,* [418 U.S. 323 (1974)]".[10] A reading of the court's opinion demonstrates that this is not so. The court, while admittedly not holding that Plaintiff enjoyed any special prominence in society, nonetheless concluded that by his actions in soliciting millions of dollars of state and federal research funds for projects initiated and controlled by himself, by publishing numerous articles concerning his work, and by using his position to cultivate press connections whereby he was able to rebut criticism of the worth of his work, Petitioner had placed himself in the forefront of the public controversy concerning public funding of his work, *Gertz* v. *Welch, supra,* 418 U.S. at 345. It is to this area alone that Senator Proxmire addressed his remarks. The standards established by this Court in prior cases have clearly been followed, and the request for Supreme Court review is nothing more than an attack on the factual analysis of both lower courts, as discreetly applied to this one factual setting. It is therefore unworthy of review.

Petitioner's attacks on the "absence of malice" findings fail for the same reason. Without challenging the legal bases for the lower courts' conclusions, Petitioner attempts to create what are termed "several serious misstatements of fact" in the opinions below by misrepresenting the record before the lower courts. No recapitulation of the record is here intended, but a short canvas of the charges is presented to demonstrate the validity of the Court of Appeal's opinion.

---

[10] Petition at p. 19.

It is charged that both Respondents "admittedly knew" the falsity of some of Senator Proxmire's factual statements, although no such admission was ever made and the affidavits of both state their past and present beliefs that all the facts stated by the Senator were true.[11] Those conscious misstatements laid at the Senator's door consist of (1) his criticism of the quality of Petitioner's work and the suggestion that it was "perhaps duplicative" even though the agencies involved purportedly all informed his staff that it was "sound" and contained "no overlap"; and (2) that the Senator stated that the public funds were received by Dr. Hutchinson himself rather than by the research institutions directed by him. The quality of Petitioner's work is, of course, a matter of opinion, and the record contains as well agency critiques that *support* the Senator's view as to possible duplication (see, e.g., Exs. 90 and 91).[12] So far as attributing funding directly to Hutchinson is concerned, this is—admittedly—an abbreviated style of identifying a grant recipient, but one used in agency grants themselves, and one used by Dr. Hutchinson himself in speaking of other investigators in his deposition.[13] This commonly accepted shorthand usage does not approach the knowledge or awareness of falsity required by the *New York Times* standard. As noted recently by the District Of Columbia Court of Appeals in *Wolston* v. *The Reader's Digest Ass'n., Inc.*, 578 F.2d 427, 434 (D.C. Cir. 1978):

---

[11] Ex. 1, ¶ 24; Ex. 3, ¶ 39.

[12] While Petitioner is correct in stating these exhibits to be evaluations of proposed work, they were based on the agency's experience with Dr. Hutchinson's actual work and commented on his organization's "already apparent tendency to overly fragment their work" and on his "many similar studies".

[13] Hutchinson Depo., p. 208.

> Imprecision and ambiguity of expression are ills that sometimes afflict even careful and well-intentioned writers, including lawyers and judges. We think of E.B. White, commenting on a fuzzy passage in one of his essays: "The thing didn't come out as clear as I would have liked, but nothing I write ever does".

The record, once reviewed, amply supports the treatment accorded Petitioner's claims in the lower courts. Again, Supreme Court hearing is sought solely to review the unanimous factual conclusions of two courts and four judges. The First Amendment questions present here are not novel, and their resolution is in accordance with established precedent of this Court.

CONCLUSION

For the foregoing reasons, Respondents William Proxmire and Morton Schwartz respectfully pray that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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Attorneys for Respondents

November 22, 1978

Supreme Court, U. S.
FILED
MAR 8 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-680

RONALD R. HUTCHINSON,
Petitioner,

vs.

WILLIAM PROXMIRE and MORTON SCHWARTZ,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-680

RONALD R. HUTCHINSON,
Petitioner,

vs.

WILLIAM PROXMIRE and MORTON SCHWARTZ,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 579 F2d 1027 (1978) and the opinion of the United States District Court for the Western District of Wisconsin is reported at 431 FSupp 1311 (1977).

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on June 30, 1978. A timely Petition for Rehearing En Banc was filed on July 14, 1978 and was denied on July 26, 1978. A timely Petition for Certiorari was filed on October 20, 1978 and Certiorari was granted on January 8, 1979. This Court's jurisdiction is invoked under 28 USC §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Speech or Debate Clause of Article I, Section 6 of the Constitution of the United States:

> "The Senators and Representatives . . . for any Speech or Debate in either House . . . shall not be questioned in any other Place."

The First Amendment to the Constitution of the United States:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

QUESTIONS PRESENTED

1. Are the press releases and newsletters of a member of Congress entitled to absolute immunity under the Speech or Debate Clause of the United States Constitution?

2. Does a research scientist who has not voluntarily thrust himself into the vortex of any important public controversy become a "public figure" within the meaning of *Gertz* v. *Welch*, 418 US 323 (1974), merely because his work is publicly funded, his scientific articles are printed in obscure technical publications, his name occasionally appears in a small local newspaper and his initial reply to a Senator's attack is partially quoted in some of the newspaper articles reporting the attack?

3. Does a defendant's pattern of malicious defamation coupled with his awareness of the truth and his admitted knowledge of the falsity of some of his statements create a genuine issue of material fact regarding the defendant's malice?

STATEMENT OF THE CASE

This is a civil action by a research scientist (Dr. Ronald R. Hutchinson) against a United States Senator (William Proxmire) and one of the Senator's administrative aides (Morton Schwartz), seeking damages for slander, libel, interference with contractual relations, invasion of privacy and intentional infliction of mental distress. The basis for federal jurisdiction is diversity of citizenship. As explained below, this suit involves a series of allegedly tortious statements made by the Senator and his aide in the context of several telephone calls, a press release, various press conferences, two newsletters, at least two television appearances and at least one radio broadcast.

The Plaintiff in this proceeding, and the Petitioner herein, is Dr. Ronald R. Hutchinson, a research scientist holding several academic degrees including a Ph.D. in experimental psychology from Yale University. Much of Dr. Hutchinson's professional career has been devoted to the study of aggression in humans and animals, including empirical research into possible techniques for quantitatively measuring latent stress and anger. (A. 282-85). To a large extent, this research has been facilitated through grants or contracts from various governmental agencies. (A. 285-87). It was on the basis of this funding that Dr. Hutchinson first came into contact with the Respondents.

In March of 1975, Respondent Proxmire launched a series of monthly press releases which he labeled "Golden

Fleece of the Month Awards". (P. 28).[1] Laden with caustic ridicule, sarcasm, and sardonic wit, these press releases were allegedly designed to attract nationwide attention to "the biggest or most ridiculous or most ironic example of government waste" which Proxmire could find each month. (A. 168). In fact, the press releases typically took one small portion of a research project out of context, distorted it and then claimed that the entire research grant was spent on that one isolated part. (A. 255-82, 287-99).[2] In connection with this monthly publicity program, Proxmire assigned his aide, Defendant Schwartz, to hunt for likely targets for the "Fleece". (P. 28; Proxmire Depo., p. 16).

The record below details two of Proxmire's Golden Fleece targets, in addition to Dr. Hutchinson. The first target was a social scientist, Dr. Elaine Walster of the University of Wisconsin - Madison. Professor Walster was contacted by telephone on March 13 or 14, 1975 by one of Proxmire's aides regarding a research project which she was conducting under a grant from the National Science Foundation. (A. 261, 276). Her research involved a complex application of "The Equity Theory" to give different categories of social relationships in search of answers to such questions as why some victims of unfair treatment respond with anger, while others passively accept their fate and still others blame themselves for their condition. (A. 261-62, 276). Because of the difficulties

1. References to "P" refer to the Petition for Writ of Certiorari, where the opinions of the lower courts are printed.

2. Proxmire's press releases never mention that the research projects have already been reviewed by a panel of independent scientists for the various federal agencies and that the projects must receive the highest ratings from these research scientists in order to receive initial and continued funding. (A. 279-80). Proxmire's attacks are harmful not only to the individual scientists involved, but they threaten basic research and the freedom of scientific inquiry. See the comments of former University of Wisconsin Chancellor William H. Sewell (A. 270-74), and the affidavit of B. F. Skinner. (A. 276-78).

in accurately communicating the details and thrust of several years of research over the telephone, it was agreed that the Professor would send Proxmire's aide a written summary of her work. (A. 262, 276). In addition, Professor Walster advised the aide that he could learn more about the research by consulting the National Science Foundation Progress Reports. (*Id.*).

On March 15, 1975, Professor Walster sent the summary of her research to Proxmire's office. (*Id.*). However, rather than wait for the factual report, Proxmire issued a press release on that same date (3/15/75) attacking and ridiculing Professor Walster's research. (A. 262, 268-69, 276). The press release characterized the Professor's research as a study of "passionate love" which addressed "erotic curiosity." (A. 268-69). The release also stated that the researchers had given caffeine tablets to students and then arranged "simulated dates" with members of the opposite sex. (*Id.*). These statements by Proxmire were false. (A. 263-66, 276). In fact, Professor Walster's grant did *not* involve a study of "passionate love," students were *not* given caffeine tablets and "simulated dates" were *not* conducted. (*Id.*).

Another social scientist whose work was misrepresented and belittled by Proxmire was Dr. Robert A. Baron of Purdue University. His research was motivated by the tragic riots which wracked many American cities during the "long hot summers" of the 1960's and the 1970's. (A. 256). Although heat was considered to be an important factor initiating the violence, no scientific studies had been conducted to actually determine the effect of heat on aggression. (*Id.*). Dr. Baron's research was designed to study this important behavioral issue. (*Id.*).

On or about March 16, 1976, Senator Proxmire issued a press release ridiculing Dr. Baron's research and award-

ing the "Golden Fleece" to the National Science Foundation for supposedly "spending $46,100 to study the effect of scantily clad women on the behavior of Chicago's male drivers." (A. 258-60). Contrary to Proxmire's misstatements, the $46,100 grant was actually used to support an extensive 2 1/2 year research project, the bulk of which involved laboratory studies to determine how excessive heat affects behavior, particularly a person's tendency to commit acts of aggression. (A. 256). The small portion of Dr. Baron's research which involved "male drivers" was intended to determine whether the findings obtained under controlled laboratory conditions could be verified under more natural circumstances. (*Id.*). Specifically, Dr. Baron and his staff observed and recorded the different emotional reactions of motorists driving air-conditioned cars as opposed to motorists driving non-air-conditioned cars on hot summer days. (A. 256-57). That portion of the overall project required less than three weeks and involved a total cost of less than $100. (A. 257). Thus, Proxmire's press release took a very small portion of Dr. Baron's 2 1/2 year project and presented it out of context, thereby giving the distorted impression that it represented the whole of Dr. Baron's study. Dr. Baron, like Professor Walster, was subjected to widespread, adverse publicity and ridicule as a result of the Respondents' erroneous press release. (*Id.*).

Still another social scientist whose work was misrepresented and ridiculed by Proxmire was Dr. Ronald R. Hutchinson, the Petitioner in the instant case. Respondent Schwartz, in the course of his search for "Fleece" victims, discovered that Dr. Hutchinson had received government funding for research which involved, among other things, experiments into the measurement of aggression by recording the biting attack behavior of laboratory monkeys under various conditions. (A. 282-85). Aware of Proxmire's bias

against social scientists (A. 77, 249), Schwartz decided to focus on Dr. Hutchinson's research as a possible subject for another monthly Fleece. (A. 180-81, P. 29).

As the investigation progressed, the Respondents received and reviewed numerous written statements from the funding agencies explaining Dr. Hutchinson's work. (A. 180-83, 189-91, 196-97, 199-201). The statement from the National Aeronautics and Space Administration (NASA), received and reviewed by Respondents prior to the issuance of the press release, included the following information:

"REASON FOR NASA SUPPORT
WORK BY DR. R. R. HUTCHINSON

"The National Aeronautics and Space Administration is sponsoring a program of research to develop improved selection and training methods for crews of space vehicles. This will be of particular importance in possible future long-duration manned space flight.

Since crews would be required to live and work together in confined spaces for long periods of time, it will be important to choose people who can work together effectively.

One of the first objectives of this project was to develop measurements of latent anger or aggression in order to measure the development of interpersonal hostility in normal people brought into the laboratory. It was demonstrated that at least one measure, jaw clenching, may be an appropriate indicator for this purpose. This technique records the electrical discharges from the jaw muscles (the masseters). With such recording, an indication of hostility is obtained apparently even when the person is unaware of any change in his attitude, and unaware that his jaw muscles have tightened." (A. 179-80).

NASA also informed the Respondents of certain specific uses for Dr. Hutchinson's research in connection with manned space missions. (*Id.*).

The Office of Naval Research (ONR) was another agency which, prior to the press release, furnished the Respondents with a detailed explanation of Dr. Hutchinson's work. One significant portion of the report contains the following conclusion:

> "This research has provided the Navy for the first time with an objective scientific testing system for measuring and examining aggressive behavior, and this permits, for example, an evaluation of specific effects of various pharmaceutical agents on these behaviors. Such information could well lead to procedures which would permit control and modification of aggressive behavior in situations where the behavior would be inappropriate and disruptive." (A. 178).

ONR also added a note concerning the cost of Dr. Hutchinson's research:

> "It should be noted that Dr. Hutchinson's work was supported by the Office of Naval Research over a six-year period at an average of $34,500 per year for all costs, including the use of animals and overhead. This is considered a moderate expenditure by the Navy for basic research." (*Id.*).

Another agency statement given to Proxmire and his staff prior to the press release explained the results of a thorough review of Dr. Hutchinson's work:

> "All reviewers recognize the value of Hutchinson's systematic, quantitative approach to an important research area that has often been plagued by subjective techniques. There was also general agreement that Hutchinson is a highly competent, hard-working, and productive investigator, and that his experiments are well designed and well executed." (A. 174).

In addition to reviewing these documents, Schwartz obtained further information concerning Dr. Hutchinson's research in the course of his telephone conversations with various agency officials. As Schwartz has admitted in sworn testimony, Dr. Woodward, project officer at ONR, defended Dr. Hutchinson's work and described it as "valid" (A. 205-06, 209) and Dr. Stollnitz, an official at the National Science Foundation (NSF), emphasized the merit of the research and told Schwartz that it was "sound". (A. 184-85).[3] In response to Dr. Stollnitz's supportive statements, Schwartz criticized the research and misrepresented R. Hutchinson's approval rate at the National Institute of Mental Health (NIMH).[4]

Notwithstanding the abundant and uncontroverted evidence that Dr. Hutchinson's research was "of particular importance" (A. 179), "well designed" (A. 174), "well executed" (*Id.*), "valid" (A. 209), "sound" (A. 206), and a "moderate expenditure" (A. 179), the Respondents drafted a caustic press release in anticipation of "fleecing" Dr. Hutchinson's work. (Proxmire Depo., p. 16; P. 30). The release contained several statements which Dr. Hutchinson contends were false and defamatory, including some statements the falsity of which has been admitted by the Respondents. (A. 201, 211, 226-27). For example, although

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3. Dr. Stollnitz also "pointed out that Senator Proxmire was concerned that the results of NSF research be applied to national problems, and here was a researcher who not only did the basic work but was willing to apply it in areas of concern to several Federal agencies." (A. 76).

4. Schwartz told Stollnitz that Dr. Hutchinson "had applied eight times to NIMH and had been turned down every time." (A. 72). In fact, at least three of Dr. Hutchinson's grant proposals had been approved by NIMH. (A. 302).

both Respondents admittedly knew the statement to be false, the press release charged that Dr. Hutchinson had personally received all of the research funds involved. (*Id.*; P. 84-86).[5] In similar fashion, the release charged that Dr. Hutchinson's projects had been "perhaps duplicative," even though the only information in the Respondents' possession which addressed the issue of possible duplication was a statement by Dr. Stollnitz of NSF that an agency study had compared Dr. Hutchinson's NSF and ONR projects and specifically found "no overlap." (A. 73).

The release also mischaracterized the nature of Dr. Hutchinson's research and ridiculed both the doctor and his work. (P. 65-67, A. 287-99). Focusing this ridicule on the fact that Dr. Hutchinson's experiments had involved measurements of jaw clenching as an indicator of latent aggression in laboratory monkeys, Proxmire accused Hutchinson of taking a "bite" out of the taxpayers, and he summarized seven full years of Dr. Hutchinson's scientific research as mere "monkey business" and "nonsense" which was "transparently worthless" and which had "made a monkey out of the American taxpayer." (P. 84-86).

After the proposed release was drafted, Schwartz called Dr. Hutchinson and read it to him. (A. 211-12, 247-49). Although Dr. Hutchinson vigorously objected to the release as inaccurate and misleading (A. 247), it was nevertheless submitted to the Senate Service Department on April 15, 1975 for release to 275 members of the news media, including CBS, NBC, ABC, the major wire services, major newspapers and magazines, and also such purveyors of the news as the *National Enquirer*. (A. 10-50, 166-67,

5. The press release stated, in part, that, "All of this money was given to Dr. Roland [sic] R. Hutchinson of Kalamazoo State Hospital in Michigan." (P. 66). Later in the release, the Respondents added, "In fact, the good doctor has made a fortune from his monkeys. . . ." (P. 67).

229). As a result, the release was widely distributed and received considerable attention across the nation. In addition to the written press release, Proxmire and Schwartz also made several oral statements to the press deriding Dr. Hutchinson and his research. (A. 167, 194-96, Proxmire Depo., pp. 39-40; Hutchinson Depo., p. 189).

Three days later, after the press release had already received nationwide publicity, Proxmire took a copy of substantially the same statement to the Senate and either handed it to the Clerk for insertion into the Congressional Record or read it on the Senate floor. (A. 220-21, 234-35). Proxmire is not certain which method he used for entering the press release into the Record, although he thinks he made a floor speech. (*Id.*).

Later, in May of 1975, Proxmire mailed a newsletter to approximately 100,000 people repeating the substance of his press release and further ridiculing Dr. Hutchinson and his work. (P. 87-88).

In addition to the foregoing statements, Proxmire also ridiculed Dr. Hutchinson on the Bob Barry radio program in Milwaukee (6/17/75) (A. 304-05), the nationally syndicated Mike Douglas television show (11/24/75) (Defendants' Trial Exhibit 6) and on at least one other television broadcast. (Ford Affidavit, Plaintiff's Trial Exhibit 8). During his appearance on the Mike Douglas show, Proxmire described the funding of Dr. Hutchinson's research as "terrible" and included it among "the most outrageous examples of wasteful extravagant stupid spending." (Defendants' Trial Exhibit 6).

During the time that Proxmire's various statements were being published throughout the country, his aide Morton Schwartz, was actively contacting the agencies which had supported Dr. Hutchinson's work and urging them to cut off funding. (A. 71-77, 90-94, 129-30, 184-86,

231). During several of these telephone calls, Schwartz misrepresented the facts concerning Dr. Hutchinson and his research. For example, he called Dr. Stollnitz at NSF and falsely stated that Dr. Hutchinson had been terminated from his research position for mismanagement of funds. (A. 91, Schwartz Depo., p. 107). He also called Dr. Krasnegor at the National Institute of Drug Abuse (NIDA) and falsely stated that "NSF, ONR and NASA were all dropping support of Dr. Hutchinson's work." (A. 130). In addition, Schwartz called Dr. Pollin at NIDA and reminded him that NIDA had not yet received a Golden Fleece. (A. 218, 242, 244). Although Schwartz contends that this "reminder" was merely a joke (A. 218), Dr. Hutchinson contends that it constituted an implicit threat. (A. 242, 244). During at least one of his agency calls Schwartz was, by his own admission, "hostile," "upset" and "angry." (A. 186).

Finally, in February of 1976, the Respondents issued a second newsletter of relevance to this case. (A. 168-73). The newsletter was entitled "Did the Golden Fleece Get Results?" and mentioned several projects which Proxmire had "fleeced." (*Id.*) Under the heading "Successes," Proxmire claimed credit for cutting off Dr. Hutchinson's funding and stopping his research as follows:

> "All the studies on why monkeys clench their jaws were dropped. No more monkey business." (A. 171).

It is Dr. Hutchinson's contention that the above-described conduct caused severe injury to his reputation, physical illness, mental distress, and substantial loss of existing and prospective economic advantage. To seek redress, he filed a Complaint in the United States District Court for the Western District of Wisconsin on April 16, 1976. Shortly thereafter, the Senate passed a resolution authorizing full payment out of the Senate contingent fund for all of Proxmire's expenses in connection with Dr. Hutchinson's suit. (Plaintiff's Trial Exhibit 45).

After the presiding judge in the Western District of Wisconsin disqualified himself, Judge Leighton of the Northern District of Illinois was designated to hear the case and the parties began filing numerous motions concerning jurisdiction, venue, extensions of time, amendment to pleadings, answers to interrogatories and production of documents. With respect to the issues currently under review, however, the only relevant motion was the motion filed by Respondent Proxmire on July 6, 1976 demanding dismissal or, in the alternative, summary judgment. This motion was based on claims of an absolute privilege under the Speech or Debate Clause (US Const, Art I, §6), a qualified privilege under the First Amendment, and the alleged absence of any genuine issue of material fact justifying a trial on merits.

The issues raised by the motion were addressed by the parties in detailed briefs supported by a total of 204 exhibits. After these documents were filed, the Trial Judge issued an Order on December 23, 1976 announcing that he intended to grant summary judgment in favor of Proxmire, but explaining that he would not enter a final order until a memorandum opinion had been filed. (A. 315-16). Then, on January 27, 1977, the Trial Judge ordered that the time for filing his memorandum be extended. (A. 316-17). The anticipated memorandum opinion was eventually issued on April 22, 1977 along with a "Ruling on Motion for Summary Judgment" stating that summary judgment had been entered in favor of Proxmire. (P. 26-67, A. 317-18). Although the opinion was not entirely clear, the trial court apparently ruled that all of Proxmire's conduct was privileged under the Speech or Debate Clause, the First Amendment and state law and also that there was no genuine issue of material fact justifying a trial on the merits. (P. 26-67). Dr. Hutchinson then filed a timely notice of appeal and Cause No. 77-

1677 was docketed in the United States Court of Appeals for the Seventh Circuit.

With respect to the Co-Defendant (Morton Schwartz) who had not joined in the original motion for summary judgment, the trial court served notice that the suit against the Senator's aide would be dismissed on the court's initiative unless Dr. Hutchinson made a showing within 30 days that such dismissal should not be ordered. (P. 64). Accordingly, the parties filed various briefs and several new exhibits and, on June 22, 1977, the Trial Judge issued a "Minute Order" dismissing the suit against Schwartz. (A. 318-19). No explanatory opinion was filed with the "Minute Order" and, on July 7, 1977, the Clerk of the United States District Court for the Western District of Wisconsin entered a judgment dismissing the action. (A. 320).

Dr. Hutchinson then filed a second notice of appeal to cover the judgment regarding Defendant Schwartz, and the same was docketed in the Seventh Circuit as Cause No. 77-1755. On Dr. Hutchinson's motion, the two appeals were consolidated on July 29, 1977.

Following the appropriate briefing and oral argument, the Court of Appeals entered a judgment on June 30, 1978, affirming the summary judgment and dismissal granted by the District Court. (P. 68-88). The grounds for the Court of Appeals' decision, however, were somewhat different than those expressed in the District Court opinion. Specifically, the Court of Appeals extended Speech or Debate immunity only to the Respondents' press release and newsletters, and rejected the District Court's application of such immunity to the tortious statements made in the course of the Respondents' telephone calls, television appearances, radio broadcasts and other interviews. These latter statements, while unprivileged under

the Speech or Debate Clause, were held to be privileged under the doctrine of *New York Times* v. *Sullivan*, 376 US 254 (1964) because, according to the Seventh Circuit, Dr. Hutchinson was a public figure and the Respondents had acted without malice.[6]

Doctor Hutchinson was deemed to be a public figure because his research was publicly funded, he had authored some scientific articles in obscure technical publications, his name had occasionally appeared in a small local newspaper and his initial response to Proxmire's press release was partially quoted in some of the newspaper articles reporting the attack. (P. 80-81).

On the issue of malice, the Court of Appeals acknowledged that at least some of the Respondents' statements may have been false and defamatory, but held the Respondents to be immune from liability.[7] The Court based its grant of immunity on evidence which it misread as indicating that the Respondents were unaware of the actual or probable falsity of their statements. (P. 82-83). The Court never specifically addressed the evidence concerning the Respondents' established pattern of malicious defamation (A. 255-76) or the deposition testimony wherein the Respondents admitted having prior knowledge of the falsity of some of their statements. (A. 201, 211, 226-27).

After a Petition for Rehearing En Banc was denied on July 26, 1978, Dr. Hutchinson filed a timely Petition for Writ of Certiorari which was granted by this Court on January 8, 1979.

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6. Having decided that Dr. Hutchinson was a public figure, the Seventh Circuit did not reach the issue of whether Dr. Hutchinson was a public official. (P. 81, fn. 14).

7. While acknowledging that some of the Defendants' conduct may have constituted actionable defamation, the Court of Appeals never actually reached the underlying issues of state law, but instead based its decision on the Speech or Debate and First Amendment privileges. (P. 82, fn. 15).

SUMMARY OF ARGUMENT

1. The Respondents' press release and newsletters are not entitled to absolute immunity under the Speech or Debate Clause of the United States Constitution because that Clause, as interpreted by this Court, protects only "legitimate *legislative* activity." This latter term has been strictly confined to those activities which are *necessary* to Congressional *deliberations* (i.e., voting, floor speeches, committee reports and official hearings). Many other Congressional activities such as press releases and newsletters may be entirely legitimate, but they are not legislative in character and thus are not entitled to absolute immunity under the Speech or Debate Clause.

2. None of the Respondents' statements are entitled to a qualified privilege under the doctrine of *New York Times* v. *Sullivan*, 376 US 254 (1964). The "actual malice" standard does not apply here because the Petitioner is not a "public figure" as that term has been defined by this Court. Rather, Dr. Hutchinson is a typical government research scientist who has neither "assumed a role of especial prominence in the affairs of society" nor "thrust himself to the forefront of a particular public controversy in order to influence the resolution of the issues involved." *Gertz* v. *Robert Welch Inc.*, 418 US 323, 345 (1974). Dr. Hutchinson should not be treated as a public figure merely because this research was publicly funded, his scientific articles were printed in obscure technical publications, his name occasionally appeared in a small local newspaper and his initial reply to the Respondents' press release was partially quoted in some of the newspaper articles reporting the Respondents' attack.

3. Even if he were deemed to be a public figure, Dr. Hutchinson would still have a cause of action because

the Respondents published their statements with knowledge of their falsity or reckless disregard of the truth. In support of this contention Dr. Hutchinson cites the Respondents' awareness of the truth prior to the date of publication, plus the Respondents' established pattern of malicious defamation of social scientists and the Respondents' admitted knowledge of the falsity of some of their statements.

ARGUMENT

I. The Respondents' Press Release and Newsletters Are Not Entitled to Absolute Immunity Under the Speech or Debate Clause.

One of the principal issues facing this Court concerns the applicability of Speech or Debate immunity to the Respondents' statements. The Speech or Debate Clause, US Const Art I, Sec 6, creates an absolute privilege which immunizes United States Senators and Representatives from liability for statements made in the course of their deliberations as legislators. An analysis of the applicable precedent defining the scope of this immunity reveals a definite emphasis on the legislative-deliberative character of the activities to be protected. It has been uniformly held that Speech or Debate immunity applies only to those activities which may be classified as "legitimate legislative activities." *Gravel* v. *United States*, 408 US 606 (1972); *United States* v. *Brewster*, 408 US 501 (1972); *Tenney* v. *Brandhove*, 341 US 367 (1951).

It may be anticipated that the Respondents will follow the pattern of their previous Briefs and cite numerous authorities for the proposition that legitimate legislative activity is entitled to absolute Speech or Debate immunity.

This point, however, is tautological and plainly begs the question since the term "legitimate legislative activity" was created for the express purpose of defining the limited class of activities which are entitled to immunity under the Speech or Debate Clause. The issue is not whether legitimate legislative activity is immune, but whether the Respondents' conduct constitutes legitimate legislative activity.

In construing the term "legitimate legislative activity," this Court has repeatedly emphasized that Congressional conduct is not immune merely because it is related to the legislative process:

> "We would not think it sound or wise, simply out of an abundance of caution to doubly insure legislative independence, to extend the privilege beyond its intended scope, its literal language and its history, to include all things in any way related to the legislative process. Given such a sweeping reading, we have no doubt that there are few activities in which a legislator engages that he would be unable somehow to 'relate' to the legislative process." *United States* v. *Brewster,* 408 US 501, 516 (1972).

To be deemed "legitimate legislative activity," conduct must be *necessary to Congressional deliberations*:

> "[T]he courts have extended the privilege to matters beyond pure Speech or Debate in either house, 'only when necessary to prevent indirect impairment of such deliberation.' *United States* v. *Doe,* 455 F2d at 760." *Gravel* v. *United States,* 408 US 606, 625 (1972).

This limited category of deliberative activity has been held to include official resolutions, committee reports, voting and, of course, actual speeches and debates on the

floor of Congress. *Kilbourn* v. *Thompson,* 103 US 168 (1881); *Powell* v. *McCormack,* 395 US 486 (1969); *Cochran* v. *Couzens,* 42 F2d 788 (DC Cir. 1930); *Tenney* v. *Brandhove,* 341 US 367 (1951); *Gravel* v. *United States,* 408 US 606 (1972); *Doe* v. *McMillan,* 412 US 306 (1973). Many other Congressional activities, while entirely legitimate, are nevertheless not sufficiently legislative in character to be immune from normal legal constraints. *United States* v. *Brewster, supra,* at 512. The standard for applying the Speech or Debate Clause is neither mere legitimacy nor relationship to legislative activity, but the actual deliberative nature of the conduct itself:

> "Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, *they must be an integral part of the deliberative and communicative processes* by which members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel* v. *United States, supra,* at 625. (Emphasis added).

Even if the initial publication of a particular statement is necessary to Congressional deliberations and therefore privileged, the initial immunity will not be extended to cover subsequent republications of that same statement outside the deliberative process:

> "Nor does the Speech or Debate Clause protect a private republication of documents introduced and made private at a committee hearing, although the hearing was unquestionably part of the legislative process." *Doe* v. *McMillan,* 412 US 306, 314 (1973).

To apply these principles to the Respondents' conduct in the instant case,[8] it becomes necessary to determine whether the defamatory statements issued by the Respondents were necessary to Congressional deliberations and, if so, whether the high level of outside republication was required to serve Congressional needs. In deciding these issues, it is, of course, crucial to bear in mind the precise factual context of the instant case. First, it must be stressed that Dr. Hutchinson is *not* challenging the insertion of Respondent Proxmire's defamatory press release into the *Congressional Record,* nor is he challenging any committee hearings, voting or other clearly legislative activities. Dr. Hutchinson's complaint is limited to the Respondents' publicity releases, press interviews, political newsletters, defamatory phone calls, and appearances on television and radio talk shows.

Another fact which should be emphasized is that this case does not involve the limited distribution of an official Congressional document to a few government agencies and law libraries, but rather the widespread distribution of sarcastic personal publicity statements to virtually every major TV and radio network, wire service, newspaper and magazine in the nation. Moreover, the extensive press coverage in the instant case did not arise as the spontaneous aftermath of a legislative floor speech, but resulted instead from an orchestrated media campaign which began with a publicity release drafted and published as part of a continuing monthly series of similar press releases. Only later was the publicity statement inserted into the *Congressional Record* in the guise of a floor speech. Even after that point, Proxmire continued to republish his statements in further interviews and on entertainment-oriented TV and radio shows. Although it may be entirely legitimate for a Senator to seek such personal publicity, it is Dr. Hutchinson's contention that such non-legislative activities outside of Congress should be subjected to the same legal constraints that apply to every other person in this country.

8. In the instant case, the Court of Appeals has correctly viewed the immunity available to Senator Proxmire and his aide, Morton Schwartz, to be identical in scope. As noted by this Court, "for the purpose of construing the privilege, a member and his aide are to be treated as one." *Gravel* v. *United States, supra,* at 617, citing *United States* v. *Doe,* 455 F2d 760, at 761.

In analyzing the Speech or Debate issue in the instant case, the Court of Appeals divided the Respondents' conduct into four categories, as follows:

(1) The phone calls to various funding agencies encouraging them to terminate the Petitioner's research grants.

(2) The press release of April 18, 1975, criticizing the Petitioner's research.

(3) The two newsletters which Proxmire sent to his constituents announcing, first, that he had awarded a "Golden Fleece" to the agencies which funded Dr. Hutchinson's research and, later, that he had succeeded in cutting off Dr. Hutchinson's funding.

(4) The television, radio and other interviews wherein the Respondents discussed Dr. Hutchinson's research.

With respect to the telephone calls encouraging certain administrative agencies to terminate Dr. Hutchinson's research grants, the Court of Appeals noted the following statement from this Court's opinion in *Gravel* v. *United States*:

> "Members of Congress are constantly in touch with the Executive Branch of the Government and with administrative agencies—they may cajole and exhort

with respect to the administration of a federal state—but such conduct, though generally done, is not protected legislative activity." 408 US at 625.

Given the clear applicability of the preceding statement to the facts of the instant case, the Court of Appeals wisely decided that the Respondents' defamatory phone calls were not part of the deliberative legislative process and thus, not entitled to absolute immunity under the Speech or Debate Clause. Similarly, the court below recognized the non-legislative character of the Respondents' television, radio and other interviews and correctly ruled that these political matters did not enjoy total immunity from all legal constraints.

With respect to the Respondents' publicity release and so-called "newsletters," the inapplicability of the Speech or Debate privilege should have been equally clear, but the Court of Appeals decided to the contrary. Thus, the Court of Appeals' decision directly conflicts with the following statement of Mr. Chief Justice Burger, speaking for a majority of this Court in *United States* v. *Brewster*:

> "It is well known, of course, that Members of the Congress engage in many activities other than the purely legislative activities protected by the Speech or Debate Clause. These include a wide range of legitimate 'errands' performed for constituents, the making of appointments with government agencies, assistance in securing government contracts, preparing so-called *'newsletters'* to constituents, *news releases*, speeches delivered outside the Congress. The range of these related activities has grown over the years. They are performed in part because they have come to be expected by constituents and because they are a means of developing continuing support for future elections. *Although these are entirely legitimate activities, they are political in nature rather than legislative,* in the sense that term has been used by the Court in prior cases. But it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause." *United States* v. *Brewster, supra,* at 512. (Emphasis added).

The inconsistency between the above-cited language and the decision below is obvious; this Court's opinion in *Brewster* specifically stated that newsletters and press releases are *not* entitled to absolute immunity under the Speech or Debate Clause, whereas the Court of Appeals in the instant case has specifically held that these political publications *are* entitled to such immunity.

Ironically, the above-quoted language from *Brewster,* which the Court of Appeals implicitly rejected in extending the Speech or Debate privilege to the Respondents' press release and newsletters, is exactly the same passage which the Court of Appeals cited in support of its ruling that the Respondents' television, radio and other interviews were outside the scope of the Speech or Debate Clause. Consequently, the Court of Appeals' decision appears to be internally inconsistent and likely to cause confusion among the lower courts unless corrected by this court.

In addition to its internal inconsistency and its conflict with the language of the *Brewster* decision, the Court of Appeals' decision also suffers from several other serious defects. One of the most obvious errors may be found at the end of the section wherein the Court extended Speech or Debate immunity to the Respondents' press release. The Court began its analysis by correctly citing *Doe* v. *McMillan, supra,* for the proposition that the so-called "informing function" of Congress does not afford the members of Congress with absolute immunity to dis-

tribute actionable material to the public at large. This initial statement was undeniably correct and fully in accord with the following statement from *Doe* v. *McMillan*:

> "[W]e cannot accept the proposition that in order to perform its legislative function Congress not only must at times consider and use actionable material but also must be free to disseminate it to the public at large, no matter how injurious to public reputation that material might be." *Doe* v. *McMillan, supra,* at 316.

The lower court was similarly correct in citing *Doe* for the rule that the distribution of information outside of Congress is not entitled to absolute immunity unless it is necessary to serve the "legitimate legislative needs" of the Congress. *Doe, supra* at 324. Based on the preceding citations, as well as the subsequent decision in *Doe* v. *McMillan* on appeal after remand, 566 F2d 713 (DC Cir. 1977) cert. denied 98 SCt 1607 (1978), the court below properly concluded that Speech or Debate immunity could not be extended to the Respondents' press release unless it was deemed to be a "limited distribution" of information.

At that point in its analysis, however, the Court of Appeals committed gross error by characterizing the widespread distribution of the Respondents' publicity release as a "limited facilitation of press coverage" entitled to absolute Speech or Debate immunity. Under the facts of this case, it is difficult to imagine how any court could ever conclude that the Respondents' press coverage was "limited." It is undisputed that the Respondents' publicity release was submitted to 275 members of the news media, including CBS, NBC, ABC, all of the major wire services, numerous radio and television stations, virtually all of the major newspapers and magazines, and even the *National Enquirer*. (A. 10-50). Also included on the distribution list were several large newspaper syndicates such as The Gannett News Service (A. 39), The Field Newspaper Syndicate (A. 40), Hearst News Services (A. 39), Knight Newspapers (A. 36), The Chicago Sun Times Syndicate (A. 47), The National Feature Syndicate (A. 32), The Washington Star Syndicate (A. 19), Scripps-Howard Publications (A. 25), and Cox Newspapers (A. 43), as well as other local and regional newspapers across the country, including The Washington Post (A. 20), The New York Times (A. 29), The Wall Street Journal (A. 22), The Christion Science Monitor (A. 11), The St. Louis Globe-Democrat (A. 13), The Indianapolis News (A. 29), The Los Angeles Times (A. 34), The Houston Chronicle (A. 35), The Knoxville News-Sentinel (A. 36), The Des Moines Register (A. 41), The Detroit News (A. 41), The Chicago Tribune (A. 44), The Boston Globe (A. 47) and The Atlanta Constitution (A. 48). In fact, the widespread distribution of the Respondents' press release was not even limited to the United States media, but was sent to the British Broadcasting Corporation (BBC) (A. 46), the Canadian Broadcasting Corporation (CBC) (A. 44), the Mainichi Newspapers (A. 34), The Toronto Globe Mail (A. 24), The Vancouver Sun (A. 22) and three newspapers from London, England. (A. 35).

To refer to this comprehensive international media distribution as a "limited facilitation of press coverage" is to defy common sense, especially when the distribution of the press release is viewed in context with all of the Respondents' other republications of basically the same information in subsequent statements to the press and in political newsletters, radio interviews, phone conversations and television shows. Other than skywriting and billboards, the Respondents utilized virtually every conceivable means of mass communication in their attempt to draw international attention to their statements. Never-

theless, the court below has characterized the above-described media blitz as a "limited facilitation of press coverage" entitled to absolute immunity under the Speech or Debate Clause. Therefore, if the "limited distribution" test enunciated in *Doe* v. *McMillan, supra,* is to have any practical significance, the decision of the court below must be reversed.

In addition to the press release, the other publications afforded absolute immunity under the Court of Appeals' decision were the so-called newsletters which Proxmire mailed to his constituents. These "newsletters" might well be classified as a form of campaign literature designed to impress rather than inform the voters, but even if it is assumed that the purpose of these self-laudatory mass mailings was to inform the voters, the lower court's decision still fails to withstand constitutional muster.

In reaching its decision, the lower court seemed to be persuaded by two points. First, the subject matter and language of the newsletters were related to Proxmire's responsibilities as a member of the Senate Committee on Appropriations. Second, the court opined that, in the absense of absolute immunity for his newsletters, Proxmire would be effectively isolated from the people who elected him. Upon closer analysis, both of these points prove insufficient to warrant the application of total immunity.

The Court of Appeals' first reason for immunizing Proxmire's newsletters is contrary to the great weight of authority holding that activity within the aegis of the Speech or Debate Clause must be "necessary to prevent indirect impairment of [Congressional] deliberations." *Gravel* v. *United States, supra,* at 625. While newsletters may serve certain informational and political purposes, it can hardly be said that mass mailings to the voters back home are essential to Congressional deliberations.

Furthermore, the lower court's reliance on the subject matter of the newsletters stands in direct contravention of the well-established principle that Congressional activities do not become privileged merely because they are in some way related to the subject matter of the legislative process:

> "In no case has this Court ever treated the Clause as protecting all conduct *relating* to the legislative process. In every case thus far before this Court, the Speech or Debate Clause has been limited to an act which was clearly a part of the legislative process—the due functioning of the process." *United States* v. *Brewster, supra,* at 515-516.

The dispositive question is not whether the Respondents' statements were related to a general subject of legislative concern, but whether the statements were essential to the deliberations of Congress. It might be surmised that in this day and age, virtually everything is related in some way to federal spending. Legislators may not rely on these relationships, however, to free themselves from the legal constraints that govern the conduct of all other citizens. In *Gravel* v. *United States, supra,* for example, the subject matter of the "Pentagon Papers" was military affairs—a topic clearly within the scope of Congressional responsibility. Nevertheless, this Court wisely held that private publication of those "papers" was not entitled to Speech or Debate immunity:

> "Here, private publication by Senator Gravel through the cooperation of Beacon Press, was in no way essential to the deliberations of the Senate. . . . We cannot but conclude that the Senator's arrangements with Beacon Press were not part and parcel of the legislative process." 408 US at 625-626.

Thus, the court below has erred in granting absolute immunity to the Respondents' mass mailings based on the relationship between the subject matter of the newsletters and Proxmire's interest in public expenditures.

Similarly, the court has also erred in assuming that Proxmire will be isolated from his constituents unless all of his newsletters are cloaked in absolute immunity. Even in the absence of such immunity, Proxmire would not be forced into isolation, but would still be free to distribute mass mailings whenever he wished. The only effect of withholding immunity would be to subject his statements to the same laws which apply to all other citizens. It seems patently absurd to argue that a legislator who cannot lie to his constituents is thereby effectively isolated from them. This rationale would certainly not apply to the millions of private individuals, groups, corporations and associations who communicate very effectively without the privilege of absolute immunity.

Public corporations, for example, regularly send annual reports and other information to their shareholders without any special privileges under the Speech or Debate Clause. In fact, under the corporate and securities laws designed to protect the public interest, corporations are subject to severe penalties for the publication of misinformation in such reports. Certainly, if such strict regulations have not prevented corporations from sending mass mailings to their shareholders, it is illogical to assume that the mere absence of absolute immunity will prevent legislators from sending mass mailings to their constituents.

The unfounded nature of the Court of Appeals' assumption is further indicated by the fact that *state* legislators, unprotected by the federal Speech or Debate Clause, regularly send newsletters and other mass mailings to

their constituents. Consequently, it is logical to assume that politicians interested in serving the public (and/or being re-elected) will continue to send mass mailings to their constituents regardless of the ruling in this case. The most likely effect of a ruling granting immunity to newsletters would be to encourage the increased publication of misinformation and defamatory falsehoods, especially at election time when legislators have an obvious and substantial incentive to misrepresent their own records and to malign the reputations of their political opponents. In effect, the door would be opened to political character assassination with the simple proviso that all such attacks be printed in the form of newsletters.

In the absence of potential liability for defamation or other torts, there would be no effective legal deterrent against the intentional publication of falsehoods by members of Congress.[9] Furthermore, as knowledge of this absolute immunity became known to average citizens, it would be logical to expect that the public credibility of members of Congress would be substantially eroded. Thus, it would be directly contrary to public policy for this Court to accept the Court of Appeals' illogical assumptions and expand the limited scope of the Speech or Debate Clause to include Senator Proxmire's so-called newsletters. The public interest would be far better served by upholding the fundamental rule expressed in *Doe* v. *McMillan, supra,* as follows:

> "A member of Congress may not with impunity publish a libel from the Speaker's Stand in his home

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9. It must be borne in mind that, in addition to barring Dr. Hutchinson's claims for libel and slander, the lower court's extension of Speech or Debate immunity has also deprived the Petitioner of any remedy for the Respondents' interference with contractual relations, intentional infliction of emotional anguish and invasion of privacy.

district, and clearly the Speech or Debate Clause would not protect such an act even though the libel was read from an official committee report." 412 US at 314.

In summary, the Court of Appeals' decision to extend Speech or Debate immunity to the Respondents' press release and newsletters flies in the face of both public policy and the relevant decisions of this Court. The publications in question were not essential to Congressional deliberations, nor was their widespread distribution necessary to serve the legitimate needs of Congress. Consequently, the judgment below should be reversed.

II. The Respondents' Statements Are Not Entitled to a Qualified Privilege Under the First Amendment.

In the absence of absolute immunity under the Speech or Debate Clause, it is necessary to consider the possible applicability of a qualified privilege under the doctrine of *New York Times* v. *Sullivan*, 376 US 254 (1964). In the *New York Times* case, this Court interpreted the First and Fourteenth Amendments as requiring a qualified privilege for those who criticize the official conduct of "public officials". This new privilege was not absolute, but required defamed public officials to meet a more stringent burden of proof in order to recover for injuries to their reputations. Specifically, those victims of libel or slander who were deemed to be public officials were denied any remedy unless they could prove that the defendants had acted with "actual malice." As explained by this Court, the burden of proving "actual malice" could be satisfied by showing that the defamatory statement was published "with knowledge that it was false or with reckless disregard of whether it was false or not." 376 US at 280.

Three years after *New York Times*, the same actual malice standard was applied in a false light privacy action and extended to cover private individuals involved in matters of "public interest" as well as public officials. *Time, Inc.* v. *Hill*, 385 US 374 (1967). In the same year, the burden of showing "actual malice" was extended to "public figures" in the companion cases of *Curtis Publishing Company* v. *Butts* and *Associated Press* v. *Walker*, 388 US 130 (1967). Then, in *Rosenbloom* v. *Metromedia, Inc.*, 402 US 29 (1971), a plurality of this Court extended the *New York Times* doctrine even further by applying it to "all discussion and communication involving matters of public or general concern." 403 US at 44. In the subsequent case of *Gertz* v. *Robert Welch, Inc.*, 418 US 323 (1974), however, this Court repudiated the "general or public interest" test in libel and slander cases and cautioned that:

> "The extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge [the] legitimate state interest [in compensating the victims of defamatory falsehood] to a degree that we find unacceptable." 418 US at 346.

With respect to tort claims other than libel and slander, the effect of *Gertz* was unclear. As recently explained in *Rinsley* v. *Brandt*, 446 FSupp 850 (1977):

> "The important question remaining to be answered . . . is whether *Gertz* or *Hill* applies in the privacy context for evaluating whether or not plaintiff must show malice in order to recover. There appears to be a considerable difference of opinion on the subject." 446 FSupp at 856.

One legal analyst noted that, "*Gertz* has been viewed as a threat to the continued validity of *Hill* as it relates

to private figures,[10] and concluded that, "its logic may compel transferral of the negligence standard into the privacy area."[11] Another analyst has explained the need for standards as follows:

> "Arguably, the *Gertz* rationale is applicable to privacy cases and the courts should take the next logical step by discrediting *Time, Inc.* v. *Hill.* In privacy suits it is entirely sensible to condition the limitation of liability upon the status of the plaintiff.
>
> . . .
>
> One needs to know whether *Time, Inc.* v. *Hill* is still conceptually valid [and] whether *Gertz* has any application to privacy actions. . . ."[12]

Because one of Dr. Hutchinson's claims against the Respondents is for invasion of privacy, this case presents an:

> ". . . opportunity to determine whether the *Gertz* shift away from public interest analysis in the libel area [should] be extended to the privacy area, thus overruling the *Hill* decision." *Rinsley, supra,* at 856.

Logic dictates that *Time* v. *Hill* was already implicitly dercut in *Gertz,* and thus this Court can resolve this issue by simply explicating the effect of its prior rulings.[13]

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10. Note, *Defamation, Privacy and the First Amendment,* 1976 *Duke Law Journal* 1016, at 1019 (1976).

11. *Id.,* at 1032.

12. Lehmann, *Triangulating the Limits on the Tort of Invasion of Privacy: The Development of the Remedy in Light of the Expansion of Constitutional Privilege,* 3 *Hastings Law Quarterly* 543, at 580 and 596 (1976).

13. Lehmann, *supra,* note 12 at 593; Note, *supra,* note 11; Hill, *Defamation and Privacy under the First Amendment,* 76 *Columbia Law Review* 1205, at 1274; Phillips, *Defamation, Invasion of Privacy and the Constitutional Standard of Care,* 16 *Santa Clara Law Review* 77, 99 (1975).

Under existing precedent, the standard of proof in defamation actions clearly depends on whether the victim is deemed to be a private individual or a public person (i.e., public figure or public official), and it appears that the same distinction also applies to other tort claims premised upon a defendant's statements. Thus, it is necessary to determine whether the Court of Appeals was correct in ruling that Dr. Hutchinson was a public figure.[14] As explained in the following subsection, a proper application of the relevant standards reveals that Dr. Hutchinson was actually a private individual when he was defamed.

(A) At the time he was defamed, Dr. Hutchinson was not a public figure within the meaning of *Gertz* v. *Welch.*

The term "public figure" has been defined by this Court as follows:

> "For the most part, those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment." *Gertz, supra,* at 345.

It may be noted from the preceding definition that there are actually two types of public figures—"all-purpose public figures" and "limited issue public figures."

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14. After ruling that Dr. Hutchinson was a public figure, the Court of Appeals specifically declined to review the District Court's decision that the Petitioner was also a public official.

This distinction is more clearly set forth in the following statement from the majority opinion in *Gertz*:

> "That designation [i.e., public figure] may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions." *Gertz, supra,* at 351.

In the instant case, the Court of Appeals correctly observed that Dr. Hutchinson did not enjoy such "persuasive power and influence" or such "pervasive fame or notoriety" that he could be regarded as a public figure for all purposes. Based on essentially four separate factors, however, the Court of Appeals concluded that Dr. Hutchinson should be treated as a public figure "with regard to the propriety of his research." In the words of the Court of Appeals, these four factors were as follows:

1. "Dr. Hutchinson had actively solicited federal grants to pursue his research and had secured a substantial amount of public funds by his applications."
2. "The plaintiff had also published numerous articles regarding his work."
3. "Stories regarding his research had appeared several times in local papers."
4. "Dr. Hutchinson's answering press release was quoted in detail in the same stories which initially reported the Golden Fleece Award."

With respect to the first factor cited by the Court of Appeals, it is informative to note how little money Dr. Hutchinson personally received from the federal grants in question. During the four years from 1967 through 1970, for example, a total of less than $15,000 was involved. That amount represented reimbursements to Western Michigan's University to help defray the cost of Petitioner's summer salaries over the four years involved. From 1971 through 1975, the petitioner did not personally receive any federal research funds at all. All of the grants involved in the instant case were awarded to the State of Michigan and were administered by persons outside of Dr. Hutchinson's department. The money was dedicated exclusively to purchasing equipment and supplies and to paying the wages of researchers other than Dr. Hutchinson. In fact, during the period in question, the only public funds paid directly to the petitioner were contained in his salary as a State employee in the Michigan Civil Service. (A. 292-93, 299). Thus, it is inaccurate and misleading to characterize Dr. Hutchinson as the direct recipient of all of the research funds involved.

Even if the preceding facts are ignored, however, the mere fact that Dr. Hutchinson sought and obtained public funding for his research should not automatically convert him into a public figure. First, it should be readily apparent that a private individual does not "thrust" himself into any "public controversy" by simply submitting confidential grant applications in the context of established programs for government support of scientific research. Second, if the mere solicitation and acceptance of public funds becomes a dispositive criterion for defining limited issue public figures, then unduly large numbers of private citizens will be adversely affected. Civil Service employees, government contractors, students on scholarships and even welfare recipients would be effectively stripped of

the ability to protect their reputations, privacy and other related rights if their receipt of public funds elevated them to public figure status. As a result, many financial assistance programs designed to promote socially beneficial conduct such as scientific research might be impeded if the intended recipients declined to participate rather than sacrifice some of their civil rights and voluntarily expose themselves to an increased risk of injury from defamatory falsehoods.[15]

In addition to its practical disadvantages, a rule equating public funding with public figure status would signal a return to the rejected standard of *Rosenbloom* v. *Metromedia, supra.* As noted above, the plurality opinion in *Rosenbloom* extended the rigorous *New York Times* malice standard to "all discussion and communication involving matters of public or general concern." 403 US at 44. It might be persuasively argued that the *Rosenbloom* standard would have effectively extended the knowing-or-reckless falsity requirement to any recipient of public funds, regardless of the public or private status of the particular individual involved. The *Rosenbloom* standard, however, was repudiated by this Court in *Gertz* v. *Welch, supra,* and thus the public's general interest in the expenditure of government funds for scientific research is not a relevant criterion in determining whether an individual scientist was a public figure at the time he was defamed. Rather, it must be determined whether the scientist in question has "thrust himself to the forefront of a particular public controversy in order to influence the resolution of the issues involved," or has "invited attention and comment" or

15. An analogous danger was noted by Mr. Chief Justice Burger in his dissenting opinion in *Gertz, supra,* where he stated, "The important public policy which underlies . . . the right to counsel would be gravely jeopardized if every lawyer who takes an 'unpopular' case, civil or criminal, would automatically become fair game for irresponsible reporters and editors. . . ." 418 US at 355.

has "assumed special prominence in the resolution of public questions." *Gertz, supra,* at 345, 351. These are the only appropriate standards for determining whether an individual is a public figure.

In *Time* v. *Firestone,* 424 US 448 (1976), the preceding standards were applied to the wife of "the scion of one of America's wealthier industrial families" in the context of a highly publicized divorce action and this Court reached the following result:

> "Respondent [Mrs. Firestone] did not assume any role of especial prominence in the affairs of society, other than perhaps Palm Beach society, and she did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it.
>
> "Petitioner contends that because the Firestone divorce was characterized by the Florida Supreme Court as a 'cause célébre', it must have been a public controversy and respondent must be considered a public figure. But in so doing, petitioner seeks to equate 'public controversy' with all controversies of interest to the public. Were we to accept this reasoning, we would reinstate the doctrine advanced in the plurality opinion in *Rosenbloom* vs. *Metromedia, Inc.,* 403 US 29 (1971), which concluded that the *New York Times* privilege should be extended to falsehoods defamatory of private persons whenever the statements concern matters of general or public interest. In *Gertz,* however, the court repudiated this position, stating that 'extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge [a] legitimate state interest to a degree that we find unacceptable.' 418 US at 346." 424 US at 453-54.

In the present case, the Court of Appeals attempted to distinguish *Time* v. *Firestone* on the ground that "Dr. Hutchinson was not forced to seek public funds." (P. 81, fn. 14). Although, in a purely theoretical sense, it may be true that Dr. Hutchinson was not "forced" to solicit public funds, it is equally true that Mrs. Firestone was not "forced" to file for her divorce. Thus, the lower court has raised a distinction without a difference. As a practical matter, the only realistic method by which Mrs. Firestone could terminate her marriage was through the process of divorce, just as the only realistic method by which Dr. Hutchinson could actively pursue his basic research was through the process of public funding. In neither case, did the Petitioners thrust themselves to the forefront of any particular controversies nor did they assume special prominence in the resolution of public questions. On the contrary, Mrs. Firestone merely followed the ordinary rules and procedures for terminating a marriage and Dr. Hutchinson merely followed the ordinary rules and procedures for submitting confidential grant applications.

The second factor upon which the Court of Appeals based its finding that Dr. Hutchinson was a public figure concerned the Petitioner's publication of a number of articles regarding his scientific research.[16] This factor, like the first, does not satisfy the standards enunciated in *Gertz* v. *Welch, supra.* In fact, it was specifically noted in *Gertz* that the Petitioner therein had "published several books and articles on legal subjects" and yet this Court held that it was "*plain* that Petitioner was *not* a public figure." *Gertz, supra,* at 351, 352. The Court of Appeals should have reached the same conclusion in the instant case where all of Dr. Hutchinson's publications were

16. The overwhelming majority of these articles were published jointly with one, two or three other co-authors.

printed in highly specialized periodicals or other esoteric publications of extremely limited circulation. For example, a majority of Dr. Hutchinson's published articles appeared in an obscure technical journal known as the *Journal of the Experimental Analysis of Behavior.* (Plaintiff's Trial Exhibits 68-96). Others were printed in publications such as the *Journal of Comparative and Physiological Psychology* (Plaintiff's Trial Exhibits 82, 85, 89) and *The Physiological Record.* (Plaintiff's Trial Exhibit 88). The titles of Dr. Hutchinson's works included "Electrographic Changes in the Amygedala and Hippocampus Associated with Biting Attacks" and "Conditioning of the Aggressive Behavior of Pigeons by a Fixed-Interval Schedule of Reinforcement." (Plaintiff's Trial Exhibits 71 and 81).

In addition to noting the limited scope of distribution and the esoteric content of the articles, it is also important to emphasize that these publications were designed to disseminate scientific information, not to espouse controversial views on matters of general public concern. Thus, Dr. Hutchinson's scientific publications did not thrust him into the vortex of an important public controversy, nor did they endow him with any special prominence in the resolution of public questions, as required by *Gertz.* Consequently, the court below has erred in considering these limited publications as evidence of Dr. Hutchinson's public figure status.

In addition to citing Dr. Hutchinson's public funding and obscure technical publications, the Court of Appeals also relied upon certain newspaper "stories" which allegedly "appeared several times in local papers." (P. 80). As an initial matter, it should be noted that the court's reference to "local papers" is inaccurate since, in fact, only one local paper, *The Kalamazoo Gazette,* had printed

any articles concerning Dr. Hutchinson's research prior to the issuance of the Respondents' press release. Moreover, only one of these local articles could be properly regarded as a "story." (A. 58-59). That one article simply described some of the research at the hospital where Dr. Hutchinson worked, and did not concern any public controversy over the funding of that work. (*Id.*). All of the remaining "stories" referenced by the Court of Appeals were actually one or two-paragraph announcements inconspicuously published in the back pages of the paper. (Defendants' Trial Exhibits 47-54). The true insignificance of these routine announcements is partially indicated by the substance of the text which surrounded each article. The announcement of January 21, 1973, for example, was flanked by the obituaries and the want ads (Defendants' Trial Exhibit 52) and the announcement of March 8, 1973 was accompanied by more obituaries, as well as a report on snowmobile conditions and various stock market quotations. (Defendants' Trial Exhibit 53). If, as the Court of Appeals has held, this type of limited press coverage is sufficient to elevate a private individual to the level of a public figure, then logic dictates that the rigorous standard of *New York Times* v. *Sullivan* must necessarily apply to every Eagle Scout, accident victim or club secretary whose name is ever printed in a local newspaper. Such a conclusion, although mandated by the Court of Appeals' decision in the instant case, is clearly contrary to the spirit and the letter of the standards previously enunciated by this Court. Therefore, the decision below should be reversed.

The final point which the court below cites as evidence of Dr. Hutchinson's public figure status is that "Dr. Hutchinson's answering press release was quoted in detail in the same stories which initially reported the Golden Fleece Award. (Plaintiff's Exhibits 32-39)." (P. 80-81).

Again, a point of clarification is in order. By referring to "the same stories," the lower court has implied that Dr. Hutchinson's response was quoted in all of the stories which initially reported the Respondents' press release. This implication is misleading because, in fact, some of the stories reporting the Golden Fleece Award, including those in *The Detroit News* and *The New York Times*, made no mention whatsoever of Dr. Hutchinson's response. (Plaintiff's Trial Exhibits 33, 37). This unequal press coverage is not surprising since Dr. Hutchinson did not have access to the 275 addresses on the Respondents' media distribution list. (A. 10-50).

Thus, it is more accurate to state that *portions* of Dr. Hutchinson's reply were printed in *some* of the newspaper articles which initially reported Proxmire's press release. According to the Court of Appeals, this fact supposedly indicates that Dr. Hutchinson had sufficient access to the media to "expose through discussion the falsehood and fallacies of the defamatory statements" concerning him. *Curtis Publishing Company* v. *Butts, supra,* at 155. In reaching this conclusion, however, the court below overlooked several significant points. First, the press coverage under discussion occurred *after* the issuance of the Respondents' press release. Since the issue is whether Dr. Hutchinson was a public figure prior to the issuance of the Respondents' press release, the appropriate focus should be on his status at that time, rather than at a date after his privacy had been invaded by an internationally distributed press release which specifically named him and ridiculed his work. The Respondents are not entitled to lift themselves by their bootstraps by making the Petitioner into a public figure in order to defame him with impunity.

Another point which the Court of Appeals overlooked was Dr. Hutchinson's access to the media following the

initial coverage of his first response. Although the Respondents continued to republish their statements in many different contexts, Dr. Hutchinson was unable to respond to these other defamatory statements on the Mike Douglas Show, the Bob Barry radio show, the agency telephone calls or in the so-called newsletters. This continuing inability to respond is a more accurate indication of Dr. Hutchinson's true access to the media. The initial news coverage afforded to Dr. Hutchinson's answering press release did not provide the Petitioner with an adequate "means of counter-argument to be able to expose through discussion the falsehood and fallacies of the defamatory statements" regarding him.

A final point overlooked by the Court of Appeals is that this initial coverage of Dr. Hutchinson's position did not occur as a result of Dr. Hutchinson's public status, but rather by virtue of the persuasive power and influence of the person making the defamatory statements. Indeed, it is logical to assume that at least token press coverage would be afforded to the response of any private individual who is specifically named and publicly defamed by a United States Senator in an internationally distributed press release. Consequently, if the Court of Appeals' analysis is accepted, virtually any private person who is defamed by a truly public figure might automatically become a public figure in his own right merely because his initial denial is mentioned by the press. Under the standards enunciated in *Gertz*, it should be readily apparent that this "bootstrap" approach to public figure analysis is wholly inappropriate.

From the foregoing analysis, it should be clear that Dr. Hutchinson was not a public figure at the time he was first defamed by the Respondents. At no point did he voluntarily relinquish any part of his interests in the

protection of his personal and professional reputations, his privacy, his contractual relationships or his other civil rights. He achieved no "special prominence in the resolution of public questions" merely because of his receipt of public funds, his publication of scientific articles, the mention of his name in obscure newspaper announcements and the limited press coverage of his initial denial. On the contrary, these four factors might well apply to every government research scientist in the country, along with large numbers of other private citizens in various occupations. They, like Dr. Hutchinson, are more vulnerable to injury than true public figures and therefore should be afforded the full protection of the law.

(B) Even if Dr. Hutchinson were deemed to be a public figure, there would be a genuine issue of material fact regarding the Respondents' malice.

Although the preceding subsection demonstrates that Dr. Hutchinson is a private individual unaffected by the "actual malice" standard of *New York Times* v. *Sullivan*, the following paragraphs reveal that, even if the Petitioner were treated as a public figure, he would not lose his cause of action because the record contains sufficient evidence to raise a genuine issue of material fact regarding the Respondents' malice.[17]

Before reviewing the relevant evidence, it is appropriate to cite a number of general legal principles which apply to the instant case. First, the issue of whether a particular defendant has acted maliciously in a given case is a material question of fact. *McGovern* v. *Martz*, 182

17. This analysis of the Respondents' malice may also be pertinent to Dr. Hutchinson's claim for invasion of privacy if this Court decides that *Time, Inc.* v. *Hill*, *supra* is still good law even after *Gertz*.

FSupp 343 (DDC, 1960). Also, on a motion for summary judgment, "the inferences to be drawn from the underlying facts contained in [the moving party's] materials must be viewed in the light most favorable to the party opposing the motion." *Adickes* v. *S. H. Kress & Company*, 398 US 144, 159 (1970), citing *United States* v. *Diebold, Inc.*, 369 US 654, 655 (1962). Strict adherence to this well-established rule is especially important in defamation cases because malice is a particularly inappropriate issue to decide on a motion for summary judgment. *Poller* v. *Columbia Broadcasting Company*, 368 US 464, 473 (1962); *Vandenburg* v. *Newsweek, Inc.*, 441 F2d 378 (5th Cir. 1971); *Empire Electronics Co.* v. *United States*, 311 F2d 175, 180 (2nd Cir. 1962); *Caldwell* v. *Crowell-Collier*, 161 F2d 333 (5th Cir. 1947). As explained by the Court in *Goldwater* v. *Ginzberg*, 261 FSupp 784 (1966):

> "The issue of actual malice on the part of defendants seems *peculiarly inappropriate for a disposition by summary judgment* because it concerns 'motive, intent, and subjective feelings and reactions.' *Empire Electronics Co.* v. *United States*, 311 F2d 175, 180 (2nd Cir., 1962); see also 6 Moore's Federal Practice (2d ed) 2581. The Supreme Court has cautioned against summary judgment 'where motive and intent play leading roles.' *Poller* v. *Columbia Broadcasting Co.*, 368 US 464, 473 (1962).
>
> "Moreover, since the questions deal with the state of mind [of the] defendants . . ., Plaintiffs ought to be able to have their testimony before the trier of fact in open court on cross-examination." (*Goldwater* v. *Ginzberg*, 261 FSupp at 788. (Emphasis added).

This same principle is expressed in the Advisory Committee notes to the Federal Summary Judgment Rule (FRCP 56):

> "Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate. Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented."

Similarly, in *Vandenburg* v. *Newsweek, Inc.*, 441 F2d 378 (5th Cir. 1971), the court affirmed the District Court's refusal to grant the defendant summary judgment in a defamation case because the defendant had failed to carry his burden of establishing that there was no genuine issue as to the fact of malice. The Court noted:

> "A statement is made with actual malice if made 'with knowledge that it was false or with reckless disregard of whether it was false or not.' *New York Times* vs. *Sullivan. Proof of such a mental state must usually be inferred from circumstances difficult to develop on motion for Summary Judgment.*" 441 F2d at 380 (Emphasis added)

When these accepted standards are applied to the facts of the instant case, it becomes clear that the summary judgment upheld by the Court of Appeals was erroneous and should be reversed. For example, in its analysis of the issue of malice, the court below did not even consider the evidence of the Respondents' consistent pattern of malicious defamation. It is important to recognize that the ridicule and misrepresentation of Dr. Hutchinson's research was not an isolated incident, but occurred as part of a regular monthly series of press releases designed to achieve maximum publicity at the expense of accuracy.

The press release attacking the research of Dr. Elaine Walster was similar in many respects to the release at-

tacking Dr. Hutchinson's work. Both releases attacked social scientists, both were laden with sarcastic ridicule, both contained factual misstatements and both showed a reckless disregard for the truth. In Professor Walster's case, one of Proxmire's aides contacted the Professor for the first time on or about March 14, 1975 to discuss her research. On the next day, however, even though Proxmire's aide knew that Professor Walster was sending him a written factual summary of her work, a caustic and defamatory press release was published attacking and ridiculing the Professor's research. The release referred to "simulated dated" research which had never been conducted and falsely characterized the scientist's work as a ridiculous study of "passionate love."

The Respondents' continuing series of publicity releases also attacked the research of other social scientists such as Dr. Robert A. Baron of Purdue University. Again, the pattern was clear. As with the releases attacking Dr. Walster and the Petitioner, the release concerning Dr. Baron's research derided his work, misrepresented the facts, and presented a very small portion of the research project out of context, thereby giving the distorted impression that it represented the entire study for which the grant was awarded. As explained in Dr. Baron's affidavit, the portion of his research which Proxmire cited as costing $46,100 actually involved a total cost of less than $100. (A. 256-57). Moreover, even that small portion of Dr. Baron's research was misrepresented in the Respondents' press release. (*Id.*).

The record also reveals that it was more than mere coincidence that several Fleece victims were social scientists. In fact, at least two sources indicate that Proxmire has a strong personal bias against the social sciences, which he considers "equivalent to alchemy." (A. 77, 248-

49). Although this bias does not prove "reckless disregard of the truth," it may explain the Respondents' established pattern of recklessly disregarding the truth in connection with Golden Fleece Awards attacking social scientists. In each case, the Respondents seemed less concerned with finding the facts than with finding a project which could be mischaracterized, distorted and ridiculed. Apparently, this overriding objective caused them to disregard the facts in their effort to make each succeeding press release even more humorous and attention-getting than the preceding releases.

The Respondents' disregard for the facts of Dr. Hutchinson's research is also readily apparent from the record below. For example, the Respondents were aware of, but chose to disregard, substantial evidence of the worth and scientific merit of Dr. Hutchinson's research. Prior to the issuance of the initial press release, Respondents received and reviewed several written statements from various funding agencies explaining the specific value of Dr. Hutchinson's work.[18] NASA informed the Respondents that Dr. Hutchinson's research would be "of particular importance in possible future long-duration manned space flights." (A. 179). The Office of Naval Research (ONR) informed the Respondents that Dr. Hutchinson's research had "provided the Navy for the first time with an objective scientific testing system for measuring and examining aggressive behavior." (A. 178). Another agency assessed Dr. Hutchinson as a "highly competent, hard-

18. The Court of Appeals correctly noted that the Respondents "possessed" these agency reports (P. 82), but the Court's choice of terminology could leave the reader with the false impression that the Respondents merely had access to the reports and did not read them. Contrary to this implication, it is undisputed that the Respondents did, in fact, review these reports. Thus, Dr. Hutchinson does not contend that the Respondents failed to find the truth, but rather that they actually found the truth and chose to ignore it.

working and productive investigator," and noted that his experiments were "well designed and well executed." (A. 174).

In addition to reviewing these documents, Respondent Schwartz also had several telephone conversations with various agency officials who defended the Petitioner's work. Dr. Woodward of ONR, for example, described the research as "valid" and even Respondent Schwartz admitted that Dr. Stollnitz of the National Science Foundation told him that Dr. Hutchinson's research was "sound." (A. 184-85, 205-06, 209).

Nevertheless, in reckless disregard of these facts, the Respondents published their statements mischaracterizing and ridiculing Dr. Hutchinson's work as "nonsense" and "so-called research" which supposedly exhibited "transparent worthlessness."

At least as significant as the preceding ridicule and mischaracterization of Dr. Hutchinson's research are the specific misstatements of fact contained in the Respondents' publications. For example, the Respondents' press release charged that Dr. Hutchinson's projects may have been duplicative. In a specialized field of scientific research, many grant applications may involve similar or related studies, but to charge that a scientist has duplicated the same research under different grants is a serious allegation with grave civil and criminal implications. Consequently, this accusation by the Respondents dealt a serious blow to Dr. Hutchinson's professional reputation and his relationships with the agencies funding his various research projects. Despite the gravity of such a serious charge and the clear potential for harm to the Petitioner, the Respondents included it in their press release even though the only information in their possession which addressed the issue of possible duplication was a statement by Dr. Stollnitz of NSF that an agency study had compared Dr. Hutchinson's ONR and NSF projects and specifically found "no overlap." (A. 72-73).

Another factual misstatement contained in the Respondents' press release was the allegation that Dr. Hutchinson had received a personal fortune of $500,000 through his research activities. This statement must certainly raise a genuine issue of fact regarding the issue of malice in light of the Respondents' admissions that they knew this statement to be false. In his deposition, Proxmire admitted that he knew the federal funds in question had not been paid directly to Dr. Hutchinson, but had been granted to institutions. (A. 226). Proxmire further admitted actual knowledge that the institutions receiving the funds, and not Dr. Hutchinson, had the right to approve or disapprove of the ultimate expenditures under these grants. (A. 227). Likewise, Respondent Schwartz has also admitted that he knew, prior to the issuance of the press release, that the money in question actually went to various institutions, and not to Dr. Hutchinson. (A. 201, 211). In fact, Schwartz even knew the specific manner in which the grant money had been divided among salaries, overhead, equipment, and other items. (*Id.*).

Despite their admitted knowledge of these facts, the Respondents nevertheless issued a press release stating in part that:

> "All this money [$500,000] was given to Dr. Rolland (sic) R. Hutchinson of Kalamazoo State Hospital in Michigan."
>
> and
>
> "In fact, the good doctor has made a fortune from his monkeys, and in the process made a monkey out of the American taxpayer."

Since both of the Respondents have admitted actual knowledge that Dr. Hutchinson did not personally receive the research funds as they alleged, there should be little doubt that, at a minimum, a question of fact regarding the issue of malice has been presented for the jury. The Court of Appeals, however, failed to specifically address any of the preceding evidence. Instead, the court relied on the following observation:

> "[Defendants] possessed agency reports supporting [Dr. Hutchinson's] research and its cost. . . . In contrast, Defendants' exhibits include correspondence from agencies which criticize Plaintiff's research technique and project costs. (Defendants' Exhibit 90) At best, this could be read to show that there was a dispute as to the value of the research. This dispute by itself, however, is not sufficient to raise a question of material fact as to whether Defendants had knowledge that their statement of opinion regarding the value of the research was actually or probably 'false'." (P. 82).

The preceding observation by the Court of Appeals is both misleading and inaccurate. First of all, the court's statement is misleading because it purports to dispose of the entire malice issue, but considers only those statements ridiculing the value of Dr. Hutchinson's research, and fails to address the Respondents' charges of duplication and receipt of a personal fortune. Second, the lower court's statement is inaccurate because the record below does not include correspondence from agencies which criticized Dr. Hutchinson's research technique and project costs. The only part of the record cited by the court in support of this assertion was Defendants' Exhibit 90 which, contrary to the court's interpretation, was actually a letter from the National Institute of Mental Health (NIMH)

concerning a research *proposal* which was never funded and never became a part of Dr. Hutchinson's actual research. In fact, the agency concluded that "the quality of the proposal was far below that of [Dr. Hutchinson's] published work," and therefore implicitly supported the quality of Dr. Hutchinson's actual research.[19]

Thus, neither Defendants' Exhibit 90 nor any other defense exhibit supports the defamatory falsehoods contained in the Respondents' statements. On the contrary, all of the documents gathered and reviewed by Respondents during their investigation indicated the falsity of their subsequent allegations.[20] Certainly this evidence should raise a genuine issue of material fact as to whether the Respondents acted with a "high degree of awareness of . . . probable falsity." *St. Amant* v. *Thompson*, 390 US 727, 730-31 (1968); *Gertz* v. *Robert Welch, Inc., supra* at 342.

An additional point cited by the Court of Appeals was the fact that "Defendants even telephoned Dr. Hutchinson before the press release was issued to inform him of its content." (P. 82-83). The court fails to note, however, that after Schwartz read the proposed news release to Dr. Hutchinson, he was specifically advised that "the entire release is a travesty or mocking of the truth. It's a total distortion . . . from beginning to end it was a falsehood. . . ." (A. 247). Nevertheless, Respondents acted in reckless disregard of Dr. Hutchinson's warnings

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19. The rejection of this application also indicates that the existing process of administrative review provides an adequate mechanism for the screening of applications and assuring personal accountability for high-quality research.

20. As the lower court noted, "It is unchallenged that the Defendants spent many hours investigating and verifying their information. (Schwartz Affidavit ¶¶10-20)." (P. 82). Since all of the information revealed the falsity of the Respondents' statements, this awareness of the truth militates in favor of a finding of malice.

and proceeded to publish their press release. This conduct provides further evidence that the Respondents' press release was issued with actual malice.[21]

When the Respondents' disregard of Dr. Hutchinson's comments is coupled with their similar disregard of the facts they gathered from various government documents and agency officials, a fair inference may be drawn that the Respondents acted in reckless disregard of the truth. Moreover, when this reckless disregard is viewed in the context of the Respondents' established pattern of maliciously defaming social scientists by distorting and misrepresenting their work, the issue of fact regarding malice becomes even clearer. Finally, when all of the foregoing factors are added to the Respondents' admitted actual knowledge that at least some of their statements were incorrect, the existence of a genuine issue of fact regarding malice is undeniable. Consequently, the Petitioner is entitled to a trial on the merits.

CONCLUSION

In *Gertz* v. *Robert Welch, Inc., supra,* this Court emphasized the important social value in safeguarding the personal reputations of our nation's citizens:

> "The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose, for, as MR. JUSTICE STEWART has reminded us, the individual's right to the protection of his own good name
>
> > 'reflects no more than our basic concept of the essential dignity and worth of every human being —a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.' *Rosenblatt* v. *Baer,* 383 US 75, 92 (1966) (concurring opinion)."
>
> 418 US at 341.

The decision under review threatens to seriously abridge this legitimate state interest as well as the legitimate interests in the protection of privacy, lawful contractual relations and other civil rights. If the Court of Appeals' extension of Speech or Debate immunity is adopted by this Court, then political opponents and ordinary citizens alike would be powerless to protect themselves from personal attacks by members of Congress, no matter how false or malicious the defamatory statements might be. Similarly, the Court of Appeals' unduly expansive interpretation of *Gertz,* if allowed to stand, could signal an equally dangerous infringement on the civil rights of large numbers of private individuals previously protected under state law.

For these reasons, the Petitioner, Dr. Ronald R. Hutchinson, hereby respectfully prays that the decision of the United States Court of Appeals for the Seventh Circuit

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21. After mentioning the telephone call to Dr. Hutchinson, the court also stated that the Respondents could "point to their extensive researching of Dr. Hutchinson's applications for federal grants and contracts as support for their opinions regarding Plaintiff's 'grantsmanship.' (Defendants' Exhibit 82b, 83.)" (P. 83). Both of the Exhibits cited by the court, however, were compiled *after* this suit was commenced and thus are completely irrelevant to the malice issue. (See Proxmire's District Court Reply Brief, at pp. 3-4).

be reversed and remanded for further proceedings in accordance with the opinion of this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael E. Cavanaugh, one of the attorneys for the Petitioner herein, Dr. Ronald R. Hutchinson, hereby certify that all parties required to be served have been served with copies of the enclosed Brief for Petitioner and that such service was made in compliance with Supreme Court Rule 33 (1) upon each of the following attorneys for the Respondents: Mr. Bradway A. Liddle, Jr., Boardman, Suhr, Curry & Field, James Wilson Plaza, Suite 700, 131 West Wilson Street, P.O. Box 927, Madison, Wisconsin 53701, and Mr. Alan Raywid, Cole, Zylstra & Raywid, 2011 Eye Street, N.W., Washington, D.C. 20006, by depositing copies of the Brief for Petitioner in the United States post office with postage thereon fully prepaid.

/s/ MICHAEL E. CAVANAUGH

March 7, 1979

FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-680

RONALD R. HUTCHINSON, *Petitioner,*

v.

WILLIAM PROXMIRE and MORTON SCHWARTZ,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENTS PROXMIRE AND SCHWARTZ

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BRIEF FOR RESPONDENTS PROXMIRE AND SCHWARTZ

QUESTIONS PRESENTED

1. Under the Speech or Debate Clause, may a United States Senator criticize public spending in Congressional statements repeated in a press release and discussed in constituent newsletters without being subject to suit by the recipient of that spending?

2. Did the Court of Appeals err in finding that investigation and oversight by a United States Senator and his aide into the extent and justification of agency spending is not legitimate legislative activity, immune from question under the Speech or Debate Clause?

3. Does a publicly employed individual who voluntarily seeks and obtains large amounts of public funding for projects initiated and controlled by himself, and who invites public attention through publication of numerous articles, books, and press notices, become a "public figure" or "public official" for purposes of discussing public funding of his work?

4. Is a material issue of "actual malice" presented where the allegedly defamatory remarks are either expressions of opinion, or obviously colloquial language, reasonably descriptive of the factual situation described?

STATEMENT OF THE CASE

Senator Proxmire has directed his staff to examine questionable and wasteful federal government spending, principally in the areas where the Senator has official U.S. Senate committee responsibility (P. 28; A. 140-141).[1] When the research discloses expenditures, which in the Senator's opinion are wasteful, they may be the subject of floor comments, further investigation, public disclosure, proposal of limiting legislation, vote, or all of these measures (A.141).

[1] Citations to the Joint Appendix are designated by "A". References to the opinions of the lower courts will be to page numbers in the Petition for Certiorari, labelled as "P". Exhibits are listed either as "Pl. Ex." (Plaintiff's Exhibit) or "Def. Ex." (Defendants' Exhibit).

In March of 1975, Morton Schwartz, an experienced member of the Senator's staff, learned from NTIS (a weekly abstract of government studies and publications available to the public, prepared by the Department of Commerce) of two publications prepared under grants by the National Aeronautics and Space Administration ("NASA") by Dr. Ronald R. Hutchinson, Director of Research at Kalamazoo State Hospital (Michigan) (P. 29; A. 148-149). Schwartz obtained these studies from NASA which revealed that Hutchinson had other government contracts with the Office of Naval Research ("ONR"), the National Science Foundation ("NSF"), and the Michigan Department of Mental Health (P. 29; A. 149, 150).

In early April, 1975, Schwartz requested that the agencies provide materials and information on the listed contracts, any other contracts which Hutchinson had with these agencies, and the justification for support of the awards (P. 29; A. 149-150). Responses revealed other government contracts with the National Institute of Mental Health ("NIMH") and the National Institute of Drug Abuse ("NIDA"), for a total of eight different grants involving approximately $500,000 in federal funds. Inquiries were then made to those agencies for information on contracts with Dr. Hutchinson (A. 150-151).

After approximately forty hours of inquiry and study of the materials furnished by the agencies, Schwartz made a report to the Senator of what he deemed to be wasteful spending (P. 29-30; A. 142, 203-204, 216). The Senator agreed (P. 30; A. 142). Following an established policy of the Senator's office, Schwartz' findings and conclusions were prepared in the form of a report for use as both a speech and a

public announcement (A. 142). These were edited and approved by the Senator and, in accordance with standard practice, termed a "Golden Fleece Award" (P. 30; A. 142). All of the agencies (ONR, NASA, NSF, NIDA, and NIMH) contacted by Schwartz are within the jurisdiction of Senate Committees on which Senator Proxmire serves, with responsibility over agency budgets, appropriations, and expenditures (P. 28; A. 139-140).

The Senate speech and the press release are nearly identical in form except for the lead and concluding sentences in the press release (P. 31, 65-67; A. 80-83).[2] The speech was delivered on the floor of the Senate on April 18, 1975, and appears in the *Congressional Record* of the same date (A. 80). The speech in its factual content accurately identifies the contracting government agencies; the cost of the grants; the most recent annual expenditures; the individual agency grants by amount, subject, and year; findings from individual agency reports; the state and private institutions through which Hutchinson performed government contracts; and pending applications for additional grants (A. 80-83). To that factual base, Senator Proxmire added his opinion that the grants were wasteful, worthless, and an inappropriate expenditure of gov-

[2] The press release contains the entire text of the Senate speech, except for a remark by the Senator in the third from the last paragraph, where the Senator said: "It seems to me it is outrageous". The added lead and concluding sentences in the press release are respectively: "Senator William Proxmire (D.Wis.) announced on Friday"; and "Proxmire said that the public is urged to write him in Washington with suggestions for the 'Golden Fleece of the Month' for May." From the added remark in the *Congressional Record*, Proxmire concluded that he actually made the speech on the floor and added the "outrageous" comment. (P. 31, 65-67; A. 80-83, A. 220-21; Proxmire Depo. pp. 65-66, 70, 77-78).

ernment funds. The press release was sent to the Senate Service Department on April 15, 1975 for review and approval of its content in conformance with Senate Rules and then held for duplication and distribution in accordance with a previously listed schedule of newspapers and press media which routinely receive press releases issued by Senator Proxmire's office (P. 28, 30-31; A. 142-43). The release date of the press release was not until the morning of April 18, 1975, the same date as the Senate speech (P. 31; Def. Ex. 5).

On or about April 15, before issuance of the release, Schwartz contacted Hutchinson by telephone, told him of the planned Fleece Award to the funding agencies, and read him the text of the Proxmire statement (P. 31; A. 211-212, 245). Hutchinson objected generally to what he considered the unfair evaluation of his work, and advised that the listed application to the National Institute of Drug Abuse had in fact already been approved. (*Id.*) Hutchinson further noted the misspelling of his first name, which is "Ronald", not "Roland" and indicated that he would prepare a reply of his own (P. 31; A. 152, 212).

Hutchinson's response, entitled "Reply to Senator Proxmire's Statement of April 18, 1975" bore a release time one-half hour prior to that of Senator Proxmire's, but was actually distributed to the press and wire services the day before, on April 17 (A. 83, 194). Proxmire's office was then contacted by Associated Press seeking an explanation of what statement Hutchinson was responding to (A. 194-195).

In his release, Hutchinson emphasized the significance of his studies on measurement of animal aggression under different environment (A. 83-84). He ac-

knowledged that the work was done under federal grants of four agencies (A. 84). As in the phone conversation, Hutchinson did not challenge any of the factual statements in Proxmire's speech. His only reference to the speech was in the concluding paragraph (A. 84-85):

> Senator Proxmire berates and ridicules these agencies and their "bureaucrats" for the support of this research and the process by which the support was provided. He further evaluates the work as "transparent worthless" research. By disrupting the orderly process of governance, by belittling the reviews of the scientific funding agencies, and by public, uninformed, and inexpert discredit of work which is so socially necessary, he causes a disservice to his constituents and to the country.

Extracts of Hutchinson's release and the charge of Proxmire's "disservice to his constituents and to the country" appear in the first press coverage of the funding issue and were in the AP, UPI, Times Wire Service, and *Washington Post* stories published April 18 and 19, 1975 (A. 85-89, Pl. Exs. 32-39). Statements by the agencies defending the merit of the funding were also included in the original stories. No articles concerning the Fleece appear before these dates, or prior to the release time and day of Senator Proxmire's actual statement.

In his next report to his constituents by newsletter, Proxmire summarized his Fleece to NSF, NASA, and ONR for their funding of Hutchinson (P. 87-88). That report is essentially the same as the speech and press release, but in addition states that Hutchinson's tests and studies were not confined to monkeys, but had included a wide spectrum of the animal kingdom, including crayfish, wasps, boa constrictors, turtles, alligators, opossums, foxes, pigeons, and rats, as well as monkeys and humans (P. 87-88; See Pl. Ex. 70, A. 195).

In February 1976, in response to inquiries from constituents, Senator Proxmire issued a newsletter entitled "Did the Golden Fleece Get Results?" (A. 168). In that two-page letter Proxmire reviewed twelve of his monthly Fleeces, including ones to NSF, Selective Service, Army Corps of Engineers, the Congress, the Navy, the FAA, and the White House. Among this distinguished group the following five-line reference was made to the agencies' funding of Dr. Hutchinson (A. 168, 171):

> —The NSF, the Space Agency, and the Office of Naval Research won the "Golden Fleece" for spending jointly $500,000 to determine why monkeys clench their jaws.
>
> * * *
>
> All the studies on why monkeys clench their jaws were dropped. No more monkey business.

No mention was made of Hutchinson, his foundation, or the Kalamazoo State Hospital. No other references to his grants were made in the release. (*Id.*)

On November 24, 1975, Senator Proxmire appeared on the "Mike Douglas Show", a nationally televised program, and was asked about examples of his "Golden Fleece Awards". Senator Proxmire described three Fleece Awards (P. 70, n.3; Def. Ex. 6, pp. 2-5). The dialogue referring to government contracts with Dr. Hutchinson is (*id.*):

> Mike Douglas: You gave another award to a research project studying angry rats.

> Senator Proxmire: Well it was angry monkeys, rats and humans. It was a study that cost $500,000 to find out why people, rats and monkeys clench their jaws. They found out they clench their jaws when they were angry, when they were prodded by sticks, when they were hungry, and they didn't clench their jaws as much if they had been drinking.
>
> Mike Douglas: You know we're laughing at this but this is really really.
>
> Senator Proxmire: Oh it's terrible.

No mention was made of Dr. Hutchinson, his foundation, the contracting agencies, the dates of performance, or the date of the Fleece Award. (*Id.*)

In the course of his deposition Proxmire was asked if he made any other television or radio appearances in which his discussed his Fleece to the agencies for funding the work of Dr. Hutchinson. Senator Proxmire could not recall any and had searched his appointments calendar to assist in any such identification and found none (Proxmire Depo. pp. 41-47, 50). He did state that taped interviews in his office or over the phone would not be included on his calendar. Other than the Mike Douglas Show, no texts of broadcasts are known, although an affidavit of Richard Shannon, producer of the "Bob Barry Show" carried in Milwaukee, Wisconsin, states that Senator Proxmire appeared on June 17, 1975, and "discussed Dr. Rolland [*sic*] R. Hutchinson and the grants he received from the National Science Foundation, the National Aeronautics and Space Administration, and Office of Naval Research, to study why rats, monkeys and humans clench their teeth" (A. 304).

After the speech and press release, but before the mailing of any newsletters or appearance on radio or television, Proxmire's office additionally learned that Hutchinson apparently had obtained a personal patent developed under government funding,[3] and that the State of Michigan had conducted an audit of Hutchinson's research department (A. 153). Schwartz made additional contacts with the agencies regarding Dr. Hutchinson's funding to: (1) ascertain additional information regarding the patents and whether the agencies, through their on-going review function, had learned of the audit (A. 153-154); (2) obtain information on the current status of Hutchinson's contracts (A. 156-157); (3) prepare questions for appropriation hearings of the agencies; and (4) prepare a report in response to constituent requests (A. 157-158). Senator Proxmire then utilized this information in questioning agency witnesses at hearings on NSF appropriations for fiscal year 1977 (A. 136-137, 143-144).

The state audit referred to had begun in the Spring of 1974, a year before Hutchinson's federal grants had come to the attention of Proxmire and his staff (Hutchinson Depo. p. 87). In December 1974, during discussion of the auditor's findings, Hutchinson was told that his position would be terminated in June of 1975 (A. 236), and in January 1975, the hospital advised the various federal agencies that it would not accept renewals of government contracts beyond the mid-1975 termination date (Def. Ex. 75).

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[3] The patent was for use of nicotine. A preliminary footnote to Hutchinson's paper on nicotine effect (Def. Ex. 71), shows that his work in this area was supported by ONR, NASA, NSF, the State of Michigan through two different institutions, and by Philip Morris.

The audit report was highly critical of Hutchinson's activities as research director, alleging failure to properly account for funds, misuse and misappropriation of funds and government equipment, and commingling of public funds with the funds of his private Foundation for Behavioral Research (A. 95-108).[4] A preliminary draft of the audit had been circulated to government officials the same day the Fleece was announced (Hutchinson Depo. pp. 99-100), and was released as a public document in early May (Def. Ex. 106). Press coverage was extensive and colorful, and linked Hutchinson's misuse of public funds to the loss of his position (A. 109-128). Although not alluded to by Senator Proxmire, the release of the audit and its news coverage preceded the Senator's constituent letters and interviews about funding of Hutchinson's studies.

From 1968 until his termination in mid-1975, except for one state project of no more than three months' duration, Hutchinson worked exclusively on federal agency-sponsored projects initiated and directed by himself. During that period he was a State of Michigan employee of the Department of Mental Health, first as Director of Research at Fort Custer State Home from 1968-1972, and then as Director of Research, Kalamazoo State Hospital. Both posts originally were established for Hutchinson, with the understanding that he would obtain federal research grants (Hutchinson Depo. pp. 10-11, 22-23, 26-28, 31-34). The research post

[4] This included having the Research Department transfer $3000 to the private Foundation (both headed by Hutchinson), which in return awarded the Research Department a $3000 grant to engage in a seminar/retreat in Nassau. State officials were then told only that expenses were being covered by a private foundation (A. 103-104).

was eliminated upon Hutchinson's departure in June of 1975 (A. 235-236).

During his seven years' tenure as Research Director, Hutchinson selected the projects, without ceiling or limitation, selected and supervised the personnel for the performance of the projects, and controlled and directed the use of research facilities and research funds (Hutchinson Depo. pp. 5-9, 18-23). Annual state budgets prepared by Hutchinson were submitted on the basis of federal contracts and grants, and state funds were approved to supplement the federal projects exclusively performed under Hutchinson (*id.* pp. 8, 14, 31). Throughout his tenure, all of the research monies were from federal and state funds (*id.* p. 135).

During that same period, federal grants under Hutchinson's control and supervision totalled $917,441 from five separate federal agencies (A. 312), with an estimated 50% or more of matching funds received from the State of Michigan (A. 96). Additional applications submitted to ten different federal agencies during that period, but for commitments beyond 1975, totalled $4,738,822, exclusive of state funds (A. 306-309). Hutchinson was not centrally controlled or supervised by any federal agency, but reported separately to each of the five agencies concerning their respective research grants. New grant proposals to each agency generally include no cost information on continuing grants with other agencies, or list other pending applications (Hutchinson Depo. pp. 283-286, 293-294). Apart from the information gathered by Senator Proxmire and reported in his speeches, there is no central federal accounting or total funding record of Hutchinson's federal support.

Following announcement by the state that it was terminating Hutchinson's position and would no longer accept funds in its name, Hutchinson solicited "renewals" of the existing agency contracts to be made to his own Foundation of Behavioral Research, the non-profit corporation he had founded in 1972 (Def. Exs. 76, 77). Later tax returns show that hundreds of thousands of dollars of equipment paid for by the government were transferred to Hutchinson's private foundation, and listed as assets of that foundation (Hutchinson Depo. pp. 148-149). Subsequent to the Fleece and the announced termination of his state position, his Foundation has received at least three renewals or additional government contracts (P. 30, n.2; A. 312).

Lower Court Opinions

The district court, ruling on Defendants' motion for summary judgment, held that all acts of investigation into the funding of Hutchinson's research were legitimate legislative activity privileged under the Speech or Debate Clause. It further held that the press release authorized by Proxmire, including the floor speech critical of the funding, was similarly privileged. With respect to the newsletter and news interviews, the court ruled that Hutchinson was a public figure and a public official, that the record could not support a finding of "actual malice", and that Defendants were therefore entitled to summary judgment on First Amendment grounds.

The court of appeals affirmed that the press release was absolutely immune under the Speech or Debate Clause, and found the privilege also applicable to comments contained in newsletters mailed to constituents. The court recognized immunity for acts of investigation prior to the date of the Senator's speech and press release, but declined to extend the immunity to acts of follow-up investigation and oversight. These acts, as well as the news interviews, the court found, were privileged under the First Amendment because Dr. Hutchinson was a public figure, and the record failed to establish actual malice.

SUMMARY OF ARGUMENT

(1) The right of representatives to communicate with their constituents and the public through publications authorized by Congress is mandated both by the historic purpose of the Speech or Debate Clause and by recognition of the role that "informing" plays in the legislative process. The growth of Congressional business has lessened the importance of actual speech on the floor, and use of the public forum to inform other Members or to muster constituent pressure is often an essential element in the development of legislation. *Doe* v. *McMillan,* 412 U.S. 306 (1973) provides immunity for such acts of informing about Congressional business where Congressionally authorized channels of communication are used.

(2) Senator Proxmire's investigation of federal agency funding of Petitioner's research was also legitimate legislative activity, absolutely immune under the Speech or Debate Clause. The investigation, both before and after the Senator's April 18, 1975 speech, sought information relevant to the Senator's ongoing responsibilities on Senate appropriations subcommittees, and was in an area on which legislation could be had.

(3) Dr. Hutchinson is both a public official and public figure. His position as Director of Research at a state hospital vested him with total responsibility for decisions involving millions of dollars of public funds and equipment, and gave him complete autonomy in selecting the work for which those resources would be used. His public position, therefore, involved sufficient individual responsibility so that the public had a legitimate interest in his personal qualifications and performance. Similarly, Dr. Hutchinson's voluntary involvement in soliciting substantial amounts of public funding to support his work, and his attempts to invite public attention to his work through publication of numerous articles and news releases, made him a "public figure" for purposes of discussing the merits of his research, and the justification for its support through public funding.

(4) Senator Proxmire's characterizations of the value of Petitioner's work were expressions of opinion whose truth cannot be judicially determined. The record cannot support a finding of actual malice regarding any of the factual statements made by Respondents, because their investigation prior to release of the statements had been thorough, and produced reasonable evidentiary support justifying each of the statements made.

ARGUMENT

I. Defendants' Acts of Investigating and of Informing Through Newsletter and Press Release Are Legitimate Legislative Activity Absolutely Immune Under the Speech or Debate Clause.

The Seventh Circuit Court of Appeals found that Senator Proxmire's preliminary investigation of agency spending, and the reporting of his conclusions contained in the Senate speech by newsletter and press

release, constituted legitimate legislative activity entitled to absolute immunity under the Speech or Debate Clause of the United States Constitution. Follow-up investigation with agency officials, the Court concluded, was not similarly protected. While a review of the Clause's historical purpose and an analysis of Congress' function and manner of operation indicates that all of these actions are legitimate legislative activity, Petitioner has argued that the *dicta* of past cases—principally dealing with alleged criminal offenses—require that Senator Proxmire's investigation and open criticism of public spending be reviewed.

Members of Congress enjoy an absolute privilege against liability for their legitimate legislative activity. This is guaranteed by the Speech or Debate Clause, Art. I. Sec. 6, which provides:

> The Senators and Representatives . . . for any Speech or Debate in either House . . . shall not be questioned in any other Place.

In its earliest interpretation of the Speech or Debate Clause, this Court recognized the broad application of the privilege beyond words spoken in debate, and found it to apply "to things generally done in a session of the House by one of its members in relation to the business before it", *Kilbourn* v. *Thompson,* 103 U.S. 168, 204 (1881). Subsequent cases have maintained a broad construction of the privilege to protect activity of legislative defendants or their aides "acting in the sphere of legitimate legislative activity", *Tenney* v. *Brandhove,* 341 U.S. 367, 376 (1951); *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491 (1975). Once found to apply, the immunity is absolute and protects legislators "not only from the consequences of litigation's

results but also from the burden of defending themselves", *Dombrowski* v. *Eastland,* 387 U.S. 82, 84-85 (1967).

Whether any particular action is essential to legislating must be determined in view of the historical purpose of the Clause, ". . . interpreted in light of the American experience, and in the context of the American constitutional scheme of government . . .", *United States* v. *Brewster,* 408 U.S. 501, 508 (1972). This makes a consideration of the proper functions of Congress in our system of representative government, and a practical evaluation of the means necessary to fulfill those functions, indispensable. Without such review, the perception of Congress may become constricted by ideas suiting a less complex society, and a greater portion of the ordering of public affairs will be assumed by the executive and the courts.[5]

The actions of Senator Proxmire and his staff in investigating and informing Congress and the public of what he believed to be waste and inefficiency in government were within the historical contours of the Clause, and were as well an essential part of the legislative function. That history and function, as well as this

[5] This conclusion was repeated by Senator Metcalf during the 1973 hearings on the Constitutional immunity of Members of Congress:

> As one and one are two, then, the narrower the definition of legislative acts is:
>
> The broader is the jurisdiction of the Court;
>
> The more intimidating is the will of the executive;
>
> The more constricted is the independence of the legislator; and
>
> The less representative is the Congress of its constituency.

The Legislative Role of Congress in Gathering and Disclosing Information, Hearings Before the Joint Committee on Congressional Operations, 93rd Cong. 1st Sess. 2-3 (1973).

Court's pertinent interpretations of the Speech or Debate Clause, are reviewed below.

A. Senator Proxmire's acts of informing through newsletter and press release were legitimate legislative activity.

1. HISTORICAL PURPOSE OF SPEECH OR DEBATE IMMUNITY

Earlier Supreme Court cases have traced the English origin of the Speech or Debate Clause, noting the absence of illuminating debate concerning its adoption by the Constitutional Convention. Because the language of the Speech or Debate Clause is drawn almost directly from the English Bill of Rights of 1689, developed as a result of the long struggle between Parliament and the Crown, consideration of that struggle is instructive of what the American framers sought to achieve.[6]

Ironically, defense of the right of Parliamentary Members to criticize spending by the Crown itself played a substantial role in development of the privilege. The earliest historical assertion of Parliament's independence occurred in 1399 in *Haxey's Case,* where

[6] Only highlights of that history especially pertinent to the present case will be presented here, as detailed historical analyses are readily available. *See generally,* Reinstein and Silvergate, *Legislative Privilege and the Separation of Powers,* 86 HARV. L. REV. 1113, 1120-1144 (1973) (hereinafter cited as "Legislative Privilege"); Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts,* 2 SUFF. L. REV. 1, 3-16, (1968) cited with favor in *Powell* v. *McCormack,* 395 U.S. 486, 502 n. 20 (1969). Historical treatment is also contained in a number of Supreme Court Speech or Debate cases. *Kilbourn* v. *Thompson,* 103 U.S. 202-204 (1881); *Tenney* v. *Brandhove,* 341 U.S. 367, 372-374 (1951); *United States* v. *Johnson,* 383 U.S. 169, 177-180 (1966); *Gravel* v. *United States,* 408 U.S. 606, 624, 658 (1972). *See also, Coffin* v. *Coffin,* 4 Mass. 1 (1808).

Haxey was convicted for sending a bill from the House of Commons to the House of Lords critical of excessive expenditures in maintaining the royal household.[7] This same conduct was later protected by Strode's Act, passed in 1512, which declared Strode immune from punishment "for any bill, speaking, reasoning or declaring of any matter or matters concerning the Parliament . . .".[8]

In 1629, Sir John Eliot criticized the Crown's expenditures, this time used in war with France, and was convicted of sedition. Following civil war and the dethroning of Charles I, a new Parliament in 1668 declared Eliot's conviction an illegal judgment, and "against the freedom and privilege of Parliament".[9]

While challenges to the right of Parliament to criticize expenditures played a part in creating the Parliamentary privilege, it was the prosecution of a Member for republication of documents outside the House of Commons that led directly to the provision contained in the English Bill of Rights. Sir William Williams, the Speaker of the House of Commons, had republished the "Dangerfield narrative", with House approval, concerning the alleged "popish plot" to restore Catholicism as the established religion of England.[10]

The debate authorizing such publication emphasized the function of Parliament in informing the people:

[7] Oppenheim, *Congressional Free Speech,* 8 LOYOLA L. REV. 1, 7-8 (1956).

[8] 4 Hen. 8 c. 8, as reproduced in TANNER, TUDOR CONSTITUTIONAL DOCUMENTS, 558-559 (2d Ed. 1930).

[9] 6 W. HOLDSWORTH, *A History of English Law* (1927). *See, United States* v. *Johnson,* 383 U.S. 169, 181-183 (1966).

[10] *Legislative Privilege,* 1128-1131.

> Let men know what they please, the weight of England is the people; and the more they know, the heavier will it be; and I wish some would be so wise as to consider, that this weight hath sunk ill ministers of state, almost in all ages; and I do not in the least doubt but it will do so to those who are the enemies of our religion and liberties.
>
> * * *
>
> The Privy Council is constituted by the King, but the House of Commons is by the choice of the people. I think it not natural nor rational, that the people who sent us hither should not be informed of our actions.[11]

Four years after the publication, following the succession of James II to the throne, Williams was prosecuted and convicted for republication of the narrative. Williams' defense that publication would encourage inquiry and was thus privileged as part of the Parliamentary function of counseling and inquiring was rejected by judges specially appointed by James II. Shortly thereafter, James was exiled, and a committee appointed by the House of Commons, including Williams, drafted what became the English Bill of Rights.[12] The committee reported that the speech or debate guarantee was inserted in the Bill for the sake of Sir William "who was punished out of Parliament for what he had done in Parliament".[13] The English Bill of Rights provided:

> That the Freedom of Speech and Debates on Proceedings in Parliament ought not to be impeached

[11] 13 How. St. Tr. 1370 (1684-1695). J. TORBUCK, A COLLECTION OF THE PARLIAMENTARY DEBATES IN ENGLAND, 92, 96 (1741).

[12] 10 H.C. Jour. 15 (Jan. 29, 1689).

[13] 9 A. GREY, DEBATES OF THE HOUSE OF COMMONS 81 (1973).

or questioned in any Court or Place out of Parliament.[14]

The Speech or Debate Clause contained in Article I, Section 6 of the United States Constitution was drawn directly from the English Bill of Rights,[15] and was unanimously adopted with little or no debate. Although little guidance is provided by the Constitutional Convention, there is a rich history of comment on the clause by the Constitutional framers and other statesmen including Jefferson, Madison and James Wilson.[16]

Wilson, one of the Constitutional delegates responsible for framing the provision, stressed that the duty of a representative made it "indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of everyone. . . ." [17] Protection for the public speech of

[14] 1 W. & M. Sess. 2, c. 2 (1689).

[15] It also appeared in Article V of the Articles of Confederation as: "Freedom of speech and debate in Congress shall not be impeached or questioned in any Court, or place out of Congress . . ."

[16] The importance of English precedent after adoption of the privilege in the U.S. Constitution becomes less important, and more subject to dispute. *Stockdale* v. *Hansard*, 9 Ad. & E. 1, 112 Eng. Rep. 1112 (K.B. 1839) held a *publisher* liable for republication of Parliament debate, while *Wason* v. *Walter*, L.R. 4 Q.B. 73 (1868) held republication to be privileged. The correct interpretation of the two holdings is sharply contested in *Gravel* v. *United States*, 408 U.S. 606 (1972). In any event, it seems evident that the English tradition of not republishing legislative proceedings existing at the time of *Stockdale* was dramatically altered by the American concept of open assembly embodied in Article I, Section 5, *requiring* that each body keep a Journal of its proceedings.

[17] 1 WORKS OF JAMES WILSON 421 (McCloskey ed. 1967). Cited with favor in *Tenney* v. *Brandhove*, 341 U.S. 367, 373 (1951); *Powell* v. *McCormack*, 395 U.S. 486, 503 (1969).

representatives was necessary, because the nature of representative government mandated communication between the people and those to whom they had committed the exercise of power.[18] As Wilson said:

> That the conduct and proceedings of representatives should be as open as possible to the inspection of those whom they represent, seems to be, in republican government, a maxim, of whose truth or importance the smallest doubt cannot be entertained. That, by a necessary consequence, every measure, which will facilitate or secure this open communication of the exercise of delegated power, should be adopted and patronised by the constitution and laws of every free state, seems to be another maxim, which is the unavoidable result of the former.[19]

Similar sentiments were voiced by Madison, who emphasized that our system of representative government operates effectively only when the people are fully knowledgeable about their government. This requires that Congressmen "look diligently into every affair of government and talk much about what [they] see."[20] Madison saw the exchange of information about government as the heart of our Constitutional system:

> Knowledge will forever govern ignorance. And people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both.
>
> * * * *

[18] 2 ELLIOTTS DEBATES 424 (1788).

[19] 1 WORKS OF JAMES WILSON 422 (McCloskey ed. 1967).

[20] 4 PAPERS OF JAMES MADISON 236, 237 (Hutchinson ed. 1965).

> . . . the right of freely examining public characters and measures, and of free communication thereon, is the only effective guardian of every other right.[21]

The clearest exposition of the privilege and its place in the Constitutional scheme of government came in 1797 when a federal grand jury sought to investigate the conduct of several members of Congress from Virginia, including Congressman Cabell, for *sending newsletters to constituents* critical of the administration's policy concerning war in France. Thomas Jefferson, then Vice-President, joined by Madison, prepared and filed a protest to the Virginia House of Delegates which resulted in the dropping of the grand jury inquiry. That protest, because of its eloquence, its authorship, and its complete identity with the issue now before this Court, is quoted at length:

> [I]n order to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully, it was a part of the common law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance of coercion of the coordinate branches, Judiciary and Executive; *and that their communications with their constituents should of right, as of duty also, be free, full, and unawed by any:* that so necessary has this intercourse been deemed in the country from which they derive principally their descent and laws, that the correspondence between the representative and constituent is privileged there to pass free of expense through the channel of the public post, and that the proceedings of the legislature have been known to be arrested and suspended at times until the Representatives could

[21] 6 WRITINGS OF JAMES MADISON 398 (Hunt ed. 1906).

> go home to their several counties and confer with their constituents.
>
> * * *
>
> [F]or the Judiciary to interpose in the legislative department between the constituent and his representative, to control them in the exercise of their functions or duties towards each other, to overawe the free correspondence which exists and ought to exist between them, to dictate what communications may pass between them, and to punish all others, to put the representative into jeopardy of criminal prosecution, of vexation, expense, and punishment before the Judiciary, if his communications, public or private, do not exactly square with their ideas of fact or right, or with their designs of wrong, is to put the legislative department under the feet of the Judiciary, is to leave us, indeed, the shadow, but to take away the substance of representation . . . is to do away the influence of the people over the proceedings of their representatives by excluding from their knowledge, by the terror of punishment, all but such information or misinformation as may suit their own views.[22]

In the fullest and most nearly contemporaneous explanation of Congressional privilege, Jefferson and Madison emphatically expounded its application to communications between representatives and their constituents in the very form used by Senator Proxmire here. The manner in which the Congress operates in a representative democracy, more fully discussed in the next section, was recognized as requiring a free flow of information *in order to assure Congressional independence.* There is no room for equivocation—unless the principles of Jefferson's and Madison's petition

[22] 8 WORKS OF THOMAS JEFFERSON 322-327 (Ford ed. 1904) (Emphasis added).

are squarely rejected by this Court, there can be no trial of Senator Proxmire or his staff based on the communications with his constituents here.

2. The Role of Informing in the Legislative Process

Analysis of the intent of the framers makes apparent that Article I, Section 8, enumerating Congressional powers, is not a complete description of the Congressional function. The concept of representative government meant that not only would the people be governed, but they would be governed by their consent and that such consent would be based on a full awareness of the government's activities. Creating that awareness would in large part be the function of the legislature. Thus, the legislature has an informing function which is entirely distinct from the business of adopting legislation.[23]

The independent importance of the informing function, however, has tended to obscure recognition that, as the work of Congress has evolved, informing has also become an essential ingredient to the development of legislation. As shown below, to strip the informing

[23] The independent function was notably explained by Woodrow Wilson:

> It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. . . . unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct.

W. Wilson, Congressional Government 303 (1885). *See also*, Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153, 205-206 (1926).

process of legislative privilege would dramatically intrude into the manner in which Congress considers and establishes legislation.

Under traditional Parliamentary practice at the time of the Constitution, speech and debate in the legislative chambers were of central importance in determining whether, and in what form, legislation should pass.[24] But with the growth of Congressional business, the importance of floor debate has declined, until now observers agree that the process of legislative development takes place largely outside the House and Senate chambers.[25]

The role once played by debate in chambers has in large part been taken over by committees.[26] Legislative proposals are referred to the Congressional committee having jurisdiction over that type of legislation, which then considers the proposals and decides whether to recommend that the legislation proceed to the floor for approval or rejection by the general membership. Proposed legislation thus receives a detailed review only by the few Members whose committee assignments commit them to specialization in that area.

With less attention paid to daily floor proceedings, foreclosing Congressional debate in the public arena

[24] See Jefferson's Manual of Parliamentary Practice Sec. XXXI (Brown ed. 1977).

[25] *See, e.g.*, Burger, *How Can We Cope? The Constitution After Two Hundred Years*, 65 A.B.A. Journal 203, 204 (1979); *The Reorganization of Congress, A Report of the Committee on Congress of the American Political Science Ass'n.*, 13-14 (1945) ("APSA Report").

[26] E. S. Griffith, *Congress: Its Contemporary Role* 74-76 (3rd ed. 1961).

prevents those Members without committee influence from making their voices heard. Where once each Member would have an equal opportunity to put forth the force of his views, committee practice without the possibility of open, public discussion would concentrate Congressional powers over legislation and public opinion in the hands of a few.

But use of the public forum is not only needed by those Members lacking committee input; such use is often a practical necessity in order for a single Member to contact and inform the broad Congressional membership. The relative inefficiency of internal circulation of lengthy printed materials was explained by Senator Proxmire in his deposition (A. 220):

> I have found in 19 years in the Senate that very often a statement on the floor of the Senate or something that appears in the Congressional Record misses the attention of most members of the Senate, and virtually all members of the House because they don't read the Congressional Record. If they are handed a news release, or something, that is going to call it to their attention . . .[27]

Thus, the work of Congress has moved from debate on the floor in two complementary directions. Detailed consideration of legislation has moved into committee, while actual discussion involving the membership at large has taken place more and more in the public forum. Each part of the process is essential to support the other.

[27] The Senator's point that public discussion is often essential to inform other legislators has also been made by this Court: "Without the information provided by the press . . . many of our representatives would be unable to vote intelligently . . ." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 492 (1975).

This is not idle reasoning; Congressional commitment to open debate as a necessary predicate of Congressional action is made explicit by the creation of a vast statutory network authorizing Congress as a whole, committees, and individual members, to communicate with and inform the public and each other about Congressional business. The *Congressional Record,* established by Congress as "substantially a verbatim report of proceedings," 44 U.S.C. § 901, is printed and issued daily, 44 U.S.C. § 903.[28] The Public Printer is required to distribute copies in various multiples to, among others, the entire legislative membership, offices of the Executive branch, the entire federal judiciary, the libraries of virtually all government offices, state government offices, foreign legations, and each newspaper correspondent listed in the Congressional Directory, 44 U.S.C. § 906.[29] Further, the Public Printer under the direction of the Joint Committee on Printing must make the Congressional Record available for sale to the general public by subscription or individual copy, 44 U.S.C. § 910.

But even the *Congressional Record* is only a small part of the broad informing mechanism established by

[28] The *Congressional Record* was previously called "The Congressional Globe". Its evolutionary development progresses from its earliest form, notes or minutes (e.g. 8 CONG. GLOBE, 26th Cong. 1st Sess. 507 (1840)), to a hybrid form of minutes and verbatim reports (e.g. 20 CONG. GLOBE, 31st Cong., 2d Sess. 432 (1851)), to essentially its present verbatim form (e.g. 27 CONG. GLOBE, 34th Cong., 3d Sess. 274 (1857)).

[29] The Public Printer is a Presidential appointee, whose office and duties are defined by statute, 44 U.S.C. §§ 301 *et seq.* In the distribution and sale of public documents, including the *Congressional Record,* the Public Printer is assisted by the Superintendent of Documents, 44 U.S.C. § 1702.

Congress to assist in its business. Committee reports, hearing records, investigative reports, reprints of speeches or addresses—all are widely disseminated to foster public awareness and discussion of legislative developments.[30]

Still another method of information dissemination is provision for media access to Congressional proceedings. This includes the establishment of media galleries and distribution of releases under Congressional supervision.[31] More recently, the intermediary of press interpretation has been supplemented by direct gavel-to-gavel coverage of some Congressional proceedings.[32]

[30] The Government Printing Office ("GPO"), which handles Congressional publications has an estimated budget of almost $74 million for Congressional binding and printing in 1979. Legislative Branch Appropriations, FY 1979, Part 2, *Hearings Before the Senate Comm. on Appropriations, Subcomm. on the Legislative Branch*, 95th Cong., 2d Sess. 401 (1978) ("Legislative Branch Appropriations, FY 1979"). The *Congressional Record* alone is printed in more than 36,000 copies each day that Congress is in session.

[31] News releases are distributed through the facilities of the news media galleries in both the Senate and the House. The Senate media galleries, which are provided and staffed by the Senate, 2 U.S.C. §§ 61f, 61f-1, provide facilities for accredited correspondents to cover all activities of Congress. See JOINT COMM. ON CONGRESSIONAL OPERATIONS, 94th Cong. 2d Sess. CONGRESSIONAL HANDBOOK 79 (1975). The management of galleries has been held immune under the Speech or Debate Clause, *Consumers Union of the United States, Inc.* v. *Periodical Correspondents Ass'n.*, 515 F.2d 1341 (D.C. Cir. 1975), *cert. den.* 423 U.S. 1051 (1976).

[32] Television broadcast of House proceedings was authorized in 1977, and began in January 1979. See H.R. Res. 866, 95th Cong., 1st Sess. (1977). Coverage of committee hearings to enlighten the public on "the operations, procedures, and practices of the House as a legislative and representative body . . ." were previously authorized by House rule, JEFFERSON'S MANUAL AND RULES OF THE

Finally, Congress has from its inception authorized its members to communicate with their constituents by free use of the mails.[33] In 1973 legislation, Congress redefined the purpose and scope of the franking privilege, emphasizing that a primary purpose of the frank is "[to convey] information to the public and . . . [to request] the views of the public" on matters which "directly or indirectly pertain to the legislative process or to any Congressional functions. . ." 39 U.S.C. § 3210 (a)(2).

The statutory scheme addresses both the type of publications that may be sent under a frank, and the content that may properly be included. Newsletters and press releases are specifically included as proper uses, § 3210(a)(3)(B), but matter which is purely personal or unrelated to official business is prohibited or unrelated to official business is prohibited, § 3210 (a)(4). Mass mailings under the frank must be approved for compliance with rules on format and con-

HOUSE OF REPRESENTATIVES H.R. DOC. 663, 94TH CONG. 2D SESS. § 720 (1977). While the Senate has not yet established continuous coverage, it does directly broadcast proceedings felt to be of particular importance. *E.g.*, the broadcast of debate on the Panama Canal treaties. See New York Times, Jan. 29, 1978, at 19, Col. 1.

[33] The Congressional frank dates back to an act of the Continental Congress in 1775. In 1789, the First Congress reaffirmed the existence of mailing privileges for members of Congress. See *Communication With Constituents: The Senator's Duty to Inform the People, Report of the Senate Ad Hoc Committee on Legislative Immunity*, 95th Cong. 1st Sess. 11-13 (1977). Besides providing the frank, Congress also facilitates communication between members of Congress and their constituents by providing allowances for telephone and telegraph, stationery allotments, and at-cost reprints of extracts of the *Congressional Record*. See JOINT COMMITTEE ON CONGRESSIONAL OPERATIONS, 94th Cong. 2d Sess. CONGRESSIONAL HANDBOOK 73 (1975); 44 U.S.C. § 907.

tent.[34] Members are specifically authorized to send either the *Congressional Record,* or excerpted speeches or reports contained in it, under the frank, 39 U.S.C. § 3212. Misuse of the frank falls within the jurisdiction of committees of both houses, 2 U.S.C. §§ 501, 502, which discipline Members for infractions of the detailed procedures governing the frank's proper use.[35]

The dissemination of information, and eliciting of public response through these mechanisms creates an interaction that is an indispensable ingredient of Congressional operations. Members are informed by their fellow Members, the press, and the public, and are, as well, stirred into action by the awareness of public participation. Examples are legion demonstrating the often-crucial connection between informing and the development of legislation.[36]

A spectacular example of the use of the informing function to influence Senatorial action occurred in connection with Senate ratification of the Panama Canal treaties in 1978. Senators favoring ratification,

[34] See Senate Comm. on Rules and Admin., Standing Rules of the United States Senate, Rule XLVIII (1977).

[35] The frank is to be used for official Senate business, and may not be used for the mailing of political matter. Regulations govern the inclusion of pictures of the Senator, and also the size type in which the Senator's name appears. There are restrictions on use of the frank to send personal greetings. Mass mailings under the frank may not be made within a certain period prior to a primary or general election. JOINT COMMITTEE ON CONGRESSIONAL OPERATIONS, 94th Cong. 2d Sess. CONGRESSIONAL HANDBOOK 193-218 (1975).

[36] In addition to those mentioned here, *Legislative Privilege,* 86 HARV. L. REV. 1113, 1151-1152 (1973) lists several examples where Congressional publicity has led to public pressure resulting in important legislation.

as well as those opposed, sought to generate national support for their own points of view with the objective of creating enough constituent pressure to swing the votes of undecided or wavering Senators.[37] "Speech or debate" was pursued with equal fervor both inside and outside the halls of Congress. To distinguish between privileged and unprivileged statements based on their geographical location would be to erect a distinction of the utmost artificiality. The debate before constituents was at least as vital to Senate consideration of ratification as were the more traditional proceedings on the Senate floor.

Another case when Congressional action was inextricably tied to Member-fomented public discussion was the legislation correcting abuses in the drug industry. Senator Estes Kefauver, who over several years in the late fifties and early sixties directed steady publicity towards the failings of government control and industry responsibility in that area, eventually succeeded, with the assistance of press coverage and public reaction, in achieving passage of drug legislation.[38]

Not surprisingly, examples of use of the informing function to influence legislation may also be found involving Senator Proxmire. In 1975, Proxmire used a

[37] See New York Times, Jan. 20, 1978, at 3, Col. 3. A group including Senators and other prominent conservatives formed a "Panama Canal Truth Squad" which conducted a speaking tour in several states where the Senators representing the state were thought to be vulnerable to constituent pressure. Senators received record amounts of constituent mail in connection with ratification proceedings. See New York Times, Feb. 21, 1978, at 31, Col. 1.

[38] J. B. GORMAN, KEFAUVER: A POLITICAL BIOGRAPHY 352-360 (1971).

press release to call public and Congressional attention to a government-sponsored study of the effects of marijuana on sexual response. The considerable public response generated was the subject of extensive comment at later appropriations hearings of the agencies involved,[39] and the Congress responded by including a provision in the Appropriations Act terminating funds for any further such studies.[40]

These examples show the close relationship between specific "informing" acts of a particular Senator or group of Senators and the development of a legislative response. The interaction between a Senator and his constituency, whether that constituency is local or national, which leads in this way to the development of legislation, is an essential part of the legislative process, and should be decisively placed within the sphere of legitimate legislative activity.

3. Supreme Court Precedent

Because maintenance of legislative independence requires something more than the isolated safeguarding of discussion and voting within the actual halls of Congress, this Court has recognized the need of Congressional representatives to remain linked by the bonds of discourse to those they represent.[41] In *Watkins* v. *United States,* 354 U.S. 178 (1957), the Court affirmed the role of Congress as watchdog of the people and contrasted improper attempts to "expose for the

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[39] See 122 Cong. Rec. H-3299 (daily ed. April 13, 1976); 122 Cong. Rec. S-7055 (daily ed. May 12, 1976).

[40] P.L. 94-303, § 404, 90 Stat. 597 (1976).

[41] *Tenney* v. *Brandhove,* 341 U.S. 367, 376 n. 6 (1951).

sake of exposure" with this historically legitimate power of the Congress "to inquire into and *publicize* corruption, maladministration or inefficiencies in agencies of the Government," *id.* at 200 n.33 (emphasis added). Chief Justice Warren, quoting the words of Woodrow Wilson, wrote for the majority that (*id.*):

> "The informing function of Congress should be preferred even to its legislative function." [citation omitted] From the earliest times in its history, the Congress has assiduously performed an "informing function" of this nature.

Since *Watkins,* the Court has nevertheless engendered confusion concerning the *means* which may be utilized in fulfillment of this task, by the sometimes unnecessarily broad generalizations and conflicting opinions in *United States* v. *Brewster,* 408 U.S. 501 (1972), *Gravel* v. *United States,* 408 U.S. 606 (1972), and *Doe* v. *McMillan,* 412 U.S. 306 (1973). While the clarification offered by the last of these decisions necessarily delineates the law applicable to the present case, Petitioner's uncritical reliance on *dicta* offered in *Brewster* requires closer analysis of the holdings of those cases and their mutual consistency.

United States v. *Brewster* held only that the unlawful taking of a bribe by a Member of Congress, even if incipient to an alleged legislative act, is itself no part of the legislative process and may be prosecuted consistent with the Speech or Debate Clause. During the course of the Court's discussion on legislative activity, however, Mr. Chief Justice Burger suggested that "the realities of the American political system" have led to performance of a number of legitimate political, but non-legislative, errands such as "so-called 'news letters' to con-

stituents, news releases, and speeches delivered outside the Congress", whose performance has never seriously been suggested to fall within Speech or Debate Clause protection.[42]

At the same time, the Court in *Gravel* v. *United States* focused on a very special exercise of the informing function, namely, arranging for private republication of classified documents introduced in a Congressional committee, in contravention of criminal statutes prohibiting public transmitting of such information.[43] The Court in *Gravel* stressed that the *illegal* nature of the action outside of Congress was of great importance to the immunity issue, noting the "decidedly jaundiced view towards extending the Clause so as to privilege illegal or unconstitutional conduct . . .",[44] and ruling (*id.* at 626):

> While the Speech or Debate Clause recognizes speech, voting, and other legislative acts as exempt from liability that might otherwise attach, it does not privilege either Senator or aide to violate an otherwise valid criminal law in preparing for or implementing legislative acts. If republication of these classified papers would be a crime under an Act of Congress, it would not be entitled to immunity under the Speech or Debate Clause.

[42] 408 U.S. at 512. The danger of offering advisory language unaided by the focus of the case or controversy at issue is nowhere so clearly demonstrated. In fact, it had never seriously been contended that such matters as newsletters and releases were *not* within the protections of Congressional immunity, and spokesmen such as Jefferson and Madison had made this emphatically clear, not long after adoption of the Constitution. *See* pp. 22-23, *supra.*

[43] 18 U.S.C. § 793; *See Gravel* v. *United States,* 408 U.S. at 608.

[44] 408 U.S. at 620.

Republication in violation of Congressional mandate wa specifically contrasted with publication authorized by Congress, on which no opinion was expressed.[45] Thus, *Gravel* indicates that Congress' ordering of its informing activities, although not decisive of the scope of Congressional privilege, may nevertheless be extremely pertinent to this Court's determination of whether any particular republication is within the legitimate needs of Congress.

Explicit recognition that republication of Congressional materials outside of Congress is protected by Speech or Debate immunity when fulfilling the legitimate need of Congress comes in *Doe* v. *McMillan, supra.* The extent of Congressional needs, and the degree to which informing the public is considered necessary to meet them, however, is easily lost within the shifting areas of agreement in the decision's five separate opinions.

Justices White and Powell "[did] not doubt the importance of informing the public about the business of Congress," 412 U.S. at 314, but adhered to the suggestion in *Gravel* that this could often be done by internal distribution of information within Congress, with the information then, passively, being available for inspection by the press and the public.[46] Accordingly, they

[45] 408 U.S. at 626, n.16. This leaves a third possibility unaddressed by *Gravel*; *i.e.*, republication that is neither prohibited, nor authorized, by Congress.

[46] 408 U.S. at 317. This response to the public need for information about the workings of government has a strong Alice-in-Wonderland quality to it. Once the need is recognized, there is little reason to immunize only the most inefficient methods of meeting it. Surely those unable to physically go to Congress, or unwilling to repose more trust in the press than in their elected representatives, equally deserve to be informed about their government's activities.

were unwilling to hold that external publication ". . ." simply because authorized by Congress, must *always* be considered 'an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings,' " *id.* (emphasis added), and left for the lower courts to determine, on a case by case basis, whether a particular public distribution was "beyond the apparent needs of the 'due functioning of the [legislative] process.' " *id.* at 317.

Justices Douglas, Brennan, and Marshall—although joining in the majority opinion—flatly reject its treatment of the "informing function" and continue stressing the immunity for informing they had previously urged in dissents (*id.* at 328):

> A legislator's function in informing the public concerning matters before Congress or concerning the administration of Government is essential to maintaining our representative democracy. Unless we are to put blinders on our Congressmen and isolate them from their constituents, the informing function must be entitled to the same protection of the Speech or Debate Clause as those activities which relate directly and necessarily to the immediate function of legislating.

Doe, however, presented an unusual case because the material published (names and embarrassing details of particular high school students) was "totally irrelevant" to the Congressional study and unconstitutionally infringed on the right of privacy by falling into that category of discourse which *Watkins* had labelled "exposure for the sake of exposure". Commitment to the legitimacy of the informing function was not abandoned, but the information published would have to

have some relevance to the public understanding of Congressional business.

Equal in defense of the informing function's legislative nature is the concurring and dissenting opinion of Justice Blackmun, of especial importance because it is joined by the Chief Justice, author of the *dicta* in *United States* v. *Brewster.* Relying on the same writings and precedents as the Douglas concurrence, Justice Blackmun concludes (*id.* at 334):

> . . . that the publication and distribution of a report compiled in connection with an officially authorized investigation is as much an "integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation" as is the gathering of information or writing and voting for the publication of the report.

Although the only point reached is distribution of authorized committee reports, the sweep of the language justifying this public distribution applies no less to Congressional publications of even a single Member. In addition to advising other Members, the legitimate ends served by publishing the committee report are listed as those (*id.* at 332):

> (1) of advising the public of proposed legislative action, (2) of informing the public of the presence of problems and issues, (3) of receiving from the public, in return, constructive comments and suggestions, and (4) of enabling the public to evaluate the performance of their elected representatives in the Congress.

Each element applies with equal force to publication of press releases or newsletters by an individual Mem-

ber. Despite the unquestionable importance of committees to the present-day legislative process, the committee is not the root of the representative system, and has no monopoly on the need or the ability to inform and receive comments from the public. It is ultimately, the representative to whom these duties fall, and there is no distinction of Constitutional magnitude which would confer Speech or Debate immunity on acts of Congressional informing through committees while leaving individual, possibly "maverick" legislators isolated from their constituents. The extension of immunity to an individual Member's publication about Congressional business through the facilities of Congress is supported both by the historical precedent upon which Mr. Justice Blackmun relies, and practical evaluation of the manner in which Congressional operations have evolved.

The concurring and dissenting opinion of Justice Rehnquist, joined by Justices Blackmun and Stewart, and Chief Justice Burger, would have held the public distribution of reports authorized by Congress immune under the Speech or Debate Clause, and deplored the majority making materials bearing on the legislative process less available than they might be.[47] Again, these Justices rejected the distinction intimated between internal and public distribution of Congressional documents, especially where the limitation on public distribution was contrary to the intent of Congress.

When the several opinions in *Doe* v. *McMillan* are read together, as they must be in order to maintain a majority beyond its narrow facts, a majority of the Court is found in agreement that informing the public

[47] 412 U.S. at 341.

of relevant Congressional business through authorized publications is a legitimate legislative function, immune from inquiry under the Speech or Debate Clause.[48] This position is wholly consistent with the Court's holding in *Gravel* v. *United States,* which dealt, quite distinctly, with publications specifically prohibited and made unlawful by Congress. Applied to the present case, this synthesis of *Doe* and *Gravel* requires immunity for Senator Proxmire's discussion of public spending in newsletter and press release. Both were publications informing the public about problems and issues of Congressional business whose distribution was authorized by Congress.[49]

If, instead of the focus on Congressional authorization or prohibition, the nature of the public distribution here is measured against the "legitimate needs" of

[48] A distinction might be conceived between publications whose distribution is particularly authorized, such as the committee report in *Doe,* and publications whose distribution is routinely authorized, such as the daily Congressional Record, or newsletters and releases under a frank. But again, if Congress has expressed its intent that the public be informed through certain methods, and has developed statutory and self-disciplinary schemes to that end, attempts to meet the acknowledged need to inform the public in the manner authorized should not be stripped of protection simply because Congress elected not to authorize such publications item by item. The expressed intent of Congress is clear in either case, and the ability to inform the public equally strong.

[49] Although the radio and television appearances may equally serve to inform the public on important issues, the connection to Congress' commitment to the informing function is less direct, as the Congressionally authorized channels of communication with the accompanying procedural safeguards are not utilized. Respondents would urge rejection of any *per se* lack of immunity principle in reference to these private, lawful publications, but have not raised this issue in view of the protection afforded these publications under the First Amendment. See pp. 49 *et seq, infra.*

the legislative function, the same result is reached.[50] As the court of appeals noted below, the newsletter to constituents and release to the Senator's media list on file with the Senate Service Department functioned simply to call attention to the Senator's statement critical of public funding. The nature of the information contained in the publications, criticism of public appropriations and the use of public funds, is peculiarly an area of great interaction between representatives and the public where broad public discourse from a variety of perspectives is required.[51] In such areas of public concern, statements made in the public forum to inform the electorate and invite response to other elected representatives are an essential component of Congressional debate.

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[50] This approach, set out by Mr. Justice White in the *Doe* v. *McMillan* "majority" opinion, has been followed by the District of Columbia Circuit on remand in *Doe* v. *McMillan*, 566 F.2d 713 (D.C. Cir. 1977), *cert. den.* 46 U.S.L.W. 3649 (1978), and by the Seventh Circuit here. In *Doe*, the limited distribution involved was held to be within the legitimate needs of Congress. The District of Columbia Circuit broadly defined the "need" of Congress to publicly distribute informing materials, noting that such information was necessary to make the "right to petition" meaningful, (*id.* at 718):

> Restricting distribution of committee hearings and reports to Members of Congress and the federal agencies would be unthinkable. Had not the subject report been available to the public, appellants might not have learned of its contents. This is an illustration of the need to make such reports generally available to the public.

[51] The importance of public participation in the public appropriations process is highlighted by such recent developments as the adoption of "Proposition 13" in California, where a public dissatisfied with the spending policies of the legislature moved directly to curtail legislative discretion in this area. New York Times, June 7, 1978, at 1, Col. 4.

The extraordinary public debates and involvement with major Congressional decisions demonstrate that use of the public forum has been necessary to offset the happenstance of committee assignments and the political power of individual Members.[52] To curtail such discussion would radically alter the reality of how Congress processes legislation. Without doubt, the more the public becomes involved, the more "political" is the process. But it must be realized that the consideration and passage of legislation is itself political. To the extent that the principle of representative government requires public participation, restricting a representative's right to inform the public on areas in which legislation may be had demeans the legislative function and interfers with the legitimate needs of Congress.

Senator Proxmire utilized the mechanisms established by Congress to inform his constituents and the general public of matters at the heart of Congressional business. Unlike *Doe,* there was no attempt to publish embarrassing details about private individuals, to "expose for the sake of exposure". Unlike *Gravel,* the means used to inform were not in contravention of criminal enactments of Congress. Involved is a simple attempt by a Member of the Senate to criticize what he considered to be misuse of public funds. As the court of appeals concluded (P. 78):

> If the informing function, even though limited, is to be accorded any absolute immunity, it must be in a case such as this.

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[52] There is another, more elementary, reason that use of the public forum may become necessary. Simply, events may occur when Congress is not in session requiring Congressional statement. A notable example was the executive election to proceed with the B-1 bomber while Congress was in recess. Senator Proxmire was among

B. The inquiries of Federal agencies by Proxmire's office were within the investigative function of Congress and as such were legitimate legislative activity.

It is not challenged that the investigation and contacts by Senator Proxmire's legislative assistant, Morton Schwartz, with officials of federal agencies *prior* to the Senator's April 18, 1975 criticism of Petitioner's funding is legitimate legislative investigation, immune under the Speech or Debate Clause, *Watkins* v. *United States,* 354 U.S. 178 (1957); *McGrain* v. *Dougherty,* 273 U.S. 135 (1927). The Court of Appeals, however, relying on dicta in *Gravel* to the effect that attempts to influence agency officials are not immune, held that any follow-up investigation was not protected by the Speech or Debate Clause because Petitioner had alleged that these contacts "were made for the *purpose* of influencing the agencies, and not for the gathering of information" (emphasis added) (P. 74). In so ruling, the court below not only failed to recognize the impropriety of an inquiry into the "purpose" of otherwise legitimate investigation, but also, more importantly, failed to distinguish between efforts to influence executive action based on unlawful acts, from the legitimate pursuit of information which may, in purpose or effect, incidentally pressure or influence agency officials. In this respect, the lower court decision effectively eviscerates Congress' ability to monitor its actions without resort to formally subpoenaed testimony, and would stifle the attempts of individual members to prepare for hearings or develop new or corrective legislation.

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those critical of the decision (in a press release) without benefit of simultaneous comment in the halls of Congress. (Def. Exs. 107-110).

In *Watkins* v. *United States, supra,* 354 U.S. at 187, this Court stated that:

> The power of Congress to conduct investigations is inherent in the legislative process. That power is broad . . . . it comprehends probes into departments of the Federal Government *to expose corruption, inefficiency or waste.* (Emphasis added.)

In *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491 (1975), the Court refused to question the *purpose* of such investigations, even where it was alleged that the "sole purpose" behind a subpoena was to "harass, chill, punish and deter" the exercise of First Amendment rights. Reaffirming the test for what constitutes legitimate legislative activity, the Court explained (*id.* at 504):

> The power to investigate . . . plainly falls within that definition. This Court has often noted that the power to investigate is inherent in the power to make laws because '[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change'.

So long as the inquiry "was intended to inform Congress in an area where legislation may be had", *id.* at 506, there could be no questioning as to motive, and there would be no balancing of its importance against the incidental effects on private rights.[53]

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[53] 421 U.S. at 508-509, and n. 16. The Court in footnote 16 rejected the invitation to consider an investigation's effects, ruling: "The speech or debate protection provides an absolute immunity from judicial interference. Collateral harm which may occur in the course of a legitimate legislative inquiry does not allow us to force the inquiry to 'grind to a halt' ".

Neither has it been suggested that the legitimacy of legislative investigation is less deserving of immunity when pursued by a member of Congress rather than by a Congressional committee, or the Congress as a whole. In *Gravel* v. *United States,* 408 U.S. 606, 624 (1972), the Court prohibited judicial review "except as it proves relevant to investigating possible third party crime, *concerning any act,* in itself not criminal, *by the Senator or his aides in the course of their employment, in preparation for the sub-committee hearing*". (Emphasis added.) Senator Gravel's acts of investigation and obtaining documents which the Court protected were not authorized by any committee, but were individual in nature.[54] The same view was expressed by the District of Columbia Court of Appeals in *McSurely* v. *McClellan,* 553 F.2d 1277, 1286-87 (D.C.Cir. 1977) (en banc), *cert. dismissed as improvidently granted,* 46 U.S.L.W. 4878 (June 26, 1978):

> We have no doubt that information gathering, whether by issuance of subpoena or field work by a Senator or his staff, is essential to informed deliberation over proposed legislation. . . . "The acquisition of knowledge through informal sources is a necessary concomitant of legislative conduct

[54] The exception for inquiry into possible criminal activity is not a restriction on the legitimacy of the investigation itself, but rather a focus on the *means* by which it may be undertaken outside of Congress. Use of illegal means, or means that violate the Constitutional rights of private parties, may be unprotected by immunity although the concomitant investigation is legitimate, as use of such means is itself no part of the legislative process. *Gravel* v. *United States, supra,* 408 U.S. at 619-620. This issue is not present in the instant case since all acts of investigation conducted by the Senator's office were completely lawful, obtaining information available to the general public, and in no way implicating Constitutional rights.

> and thus should be within the ambit of the privilege so that congressmen are able to discharge their constitutional duties properly".[55]

In contrast to these established principles of immunity for Congressional investigation, Justice White's remarks concerning Congressional contacts with executive officials to "cajole, and exhort with respect to the administration of a federal statute", *Gravel* v. *United States, supra,* 408 U.S. at 625, are rooted in *United States* v. *Johnson, supra,* which dealt with unlawful receipt of a bribe in return for a promise to make speeches or exert influence on the Justice Department. As *United States* v. *Brewster* makes clear, the judicial focus is on the unlawful and nonlegislative receipt of the bribe, rather than on the conduct promised in return.[56] To interpret the *Gravel* language to deprive of immunity *all* contacts with agency officials—even those made to gather information pursuant to Congressional investigation—is to completely shift the focus of inquiry from the non-legislative, criminal act (bribery) to an inquiry of the alleged purpose of indisputably legitimate legislative activity (investigation).[57] That

[55] Quoting, *Legislative Privilege,* 86 HARV. L. REV. 1113, 1154 (1973).

[56] 408 U.S. at 526.

[57] Petitioner's allegation that Schwartz's agency contacts were not made for the gathering of information is too flimsy a charge to withstand summary judgment. For example, the conversation Petitioner touts as showing Schwartz "angry" and "hostile" was a call made to NSF to check the status of that agency's funding of Hutchinson's work, and the "anger" was a result of Dr. Stollnitz of NSF refusing to supply the requested information. (A. 186). Whatever human emotions may also be involved, the existence of an attempt to gather pertinent information is surely present.

should not, and cannot, be done. Where, as here, the investigation is seeking information on a subject on which legislation could be had, an allegation of other purposes or effects must not be allowed to derail the Congressional activity.[58]

It is clearly beyond dispute that the investigation here is in an area on which legislation can be had. Continuous inquiry concerning the manner in which federal dollars are managed and spent is a necessary prerequisite to effective legislation for future appropriations, one of the primary duties of the Congress. The powers of Congress are derived from Article I, Section 8 of the Constitution, which provides in pertinent part:

> The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States;
>
> * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing

[58] As was said in *Rusack* v. *Harsha,* Civ. No. 77-1137 (M.D.Pa. Dec. 14, 1978), in response to the allegation that a request for information also contained abusive and possibly defamatory language: "In some situations it may be that a primarily libelous letter which is only incidentally seeking information might not be protected under the Clause. But here the letter was the second one defendant Harsha had sent . . . in an attempt to gather information. The allegedly defamatory matter might well have been considered necessary by the Congressman in order to pinpoint the exact material he was after." Slip. Op. p. 19, n. 20. It cannot be expected that Congressional requests of information will always be sanitized of harsh language, brow-beating, or criticism. If the court adopts the role of dissecting Congressional investigation and bestowing immunity only upon the language the courts feel to have been minimally necessary in order to ferret out the facts, immunity for Congressional investigation will become more pretended than real.

> Powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article I, Section 9, further defines the Congressional powers and duties. It provides in part that:

> . . . No money shall be drawn from the Treasury, but in consequence of Appropriations made by law; and regular Statement and Account of the Receipts and Expenditures of all public money shall be published from time to time. . . .

At the heart of the powers, and hence the business, of Congress, is control over the purse strings of Government. The nature and efficacy of government spending is certainly a "subject on which legislation may be had", *Eastland* v. *United States Servicemen's Fund, supra,* 421 U.S. at 508, and is thus an area in which Congress, and Congressmen, must be allowed to act. This is especially true here where, in addition to his general responsibilities, Senator Proxmire is a member of the Senate Appropriations Committee with particular authority over appropriations of all the federal funds at issue in this case.[59]

[59] The inquiries made by Senator Proxmire's Office here concern the expenditures of five government agencies: Office of Naval Research (ONR); National Science Foundation (NSF); National Aeronautic and Space Administration (NASA); National Institute of Mental Health (NIMH); and the National Institute of Drug Abuse (NIDA), each of which falls within the jurisdiction of an appropriations subcommittee upon which Senator Proxmire serves. These are the Subcommittees on Defense, Labor-HEW, and HUD-Independent Agencies. Proxmire is Chairman of the HUD-Independent Agency Subcommittee. More generally, he is also Chairman of the Subcommittee on Priorities and Economy in Government of the Joint Economic Committee (A. 139-140; and Def. Exs. 7 and 8).

The inquiries and each of the expenditures mentioned in the Senator's statement and press release all involved appropriations for which Senator Proxmire had committee responsibility and upon which he actually voted. Disbursements by these agencies to Hutchinson were the specific subject of inquiry by the Senator at committee hearings.[60] The general type of expenditure and the problems it may present have been the subject of the Senator's inquiries of the same funding agencies at appropriation subcommittee hearings *both before and after* his "Fleece" criticizing the funding of Petitioner's work.[61]

Because the matter of appropriations is a continuous, year to year process, it is impossible to reconcile the Court of Appeals' determination, that oversight investigation after a certain point is not protected activity, with the true nature of the legislative function. Investigation of agency use of funds is always both oversight concerning the past year's appropriations and prospective information gathering for the present and future.[62] This is borne out by the instant case, where Senator Proxmire used the "follow up" investigation by his assistant Morton Schwartz to question NSF witnesses in commitee hearings regarding their continuous

[60] See, *e.g.*, A. 137.

[61] A. 144-145, 63-69, 130-138.

[62] The independent importance of the oversight function is underscored by the creation of the General Accounting Office, the principal function of which is to investigate and report to Congress on "all matters relating to the receipt, disbursement and application of public funds", 31 U.S.C. § 53. The GAO is further required to analyze agency expenditures "to enable Congress to determine whether public funds have been economically and efficiently administered." 31 U.S.C. § 60.

funding activities and the responsiveness of the agency peer review system to adequately determine priorities of use for appropriated funds.[63] This, in turn, would be of great relevance concerning his committee work and votes on the control of appropriations for the following year.

The investigation by Senator Proxmire and his staff concerned a subject at the very heart of Congressional powers and activity. The fact that those possessing the needed information in this instance were government officials rather than private citizens does not mean that the investigation is thereby non-legislative. If anything, contacts with official sources would seem the most legitimate of investigative procedures. Accordingly, the conduct of Senator Proxmire and his aide in investigating government spending through such contacts was within the Senator's legitimate legislative duties, immune from question of purpose or effect in any place.

II. Defendant's Actions Were Privileged Under the First Amendment

The existence of this case presents the issue whether a United States Senator, or any member of the public, may criticize the manner, merit, and justification of public spending without fear of prolonged litigation. Here Senator Proxmire is sued by a research scientist for publicly stating that the scientist's work does not merit government funding. The thrust of the extensive documentation supporting Dr. Hutchinson's claim, including scores of publications and affidavits of other scientists, is to show that the studies *do* have merit and

[63] A. 136-138.

deserve public support. Senator Proxmire is alleged to have spoken in knowing disregard of the truth by failing to acknowledge this "fact".

That the issue Petitioner asks this Court to decide is the merits and priorities of public spending is made abundantly clear by a comparison of the Senator's speech and press release with the press release issued in rebuttal by Hutchinson. The substance of the Senator's statement is that the identified studies are not worthwhile and funding by several federal agencies is wasteful. Dr. Hutchinson in his release stresses the general public need for studies of aggression and defends the agency care in approving them. In addition, he charges Proxmire with disservice to his constituents and the country (A. 83-85). These statements—as well as the rationale by each of the agencies on the merit of the studies—raise a genuine, indeed, a fundamental, issue of public concern and debate—how government spends its limited supply of money and what it gets for it. But, it does not raise an issue for a court.

Rather than being insulated from public scrutiny, Petitioner's solicitation and utilization of public funding deserve much greater public attention. Despite the importance of the tens of billions of dollars spent by the federal government on scientific research each year, Dr. Hutchinson presents an example where—prior to the Proxmire criticism—no federal agency was aware of the total amount of funds received by Hutchinson, the number and cost of projects pending, or the extent of rejections for similar projects by other agencies (Hutchinson Depo. pp. 178-179, 283-286). Only Proxmire attempted to discover total funding, and he was successful in viewing just the tip of the iceberg.

This Court is urged to keep the debate on public spending open, vigorous, robust, and unharnessed—not only in the halls of Congress, but before the public. Petitioner, through a staggering eight million dollar libel action, wants that debate stopped and restricted to the narrow group of interested specialists who parcel out the funds, or at a minimum kept in the abstract without focus on particular example or study. If his position is accepted, those who solicit and obtain funds collected from the public for purposes of their own will nonetheless be able to curtail public discussion by claiming that this is a private matter for which they take no risk of public view. No decision of this, or any other court, supports such a view.

To uphold the "profound national commitment . . . that debate on public issues be uninhibited, robust, and wide open", the Court in *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270 (1964) interpreted the First Amendment to bar suit by public officials based on criticism of their conduct absent a showing of actual malice—that is, proof that the statement was made with knowledge that it was false or with reckless disregard of whether it was false or not (*id.* at 279-280).[64] The same reasoning was followed in *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967) where the privilege

[64] The applicability of the *New York Times* privilege to non-press defendants is unchallenged by Petitioner, and is assumed here. The *New York Times* opinion itself referred to both rights of speech and press, *supra,* 376 U.S. at 264, 265 and 268. Further, *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765 (1978) has since stressed that the press as an institution "does not have a monopoly on either the First Amendment or the ability to enlighten," *id.* at 782, and that "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon its source . . ." *id.* at 777.

was extended to criticism of "public figures". Underlying the rulings in both cases was the Court's recognition of the "practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of government affairs", *Mills* v. *Alabama,* 384 U.S. 214, 218 (1966). And the Court has also noted that principal among those affairs is the distribution of public wealth, creating a strong public concern in knowing how "funds are utilized and put to work", *Wyman* v. *James,* 400 U.S. 309, 319 (1971).

In this case, Judge Leighton in the district court, after considering the "affidavits, exhibits, and excerpts from depositions", concluded that Dr. Hutchinson was both a public official and public figure. He further found an absence of evidence to establish "actual malice" (P. 52-53). The Seventh Circuit Court of Appeals considered and affirmed the determinations of public figure and absence of malice without reaching the public official issue (P. 82). All of these issues were considered below, were properly presented in Defendants' questions for review, and are discussed here.[65]

[65] Neither lower court accorded petitioner's privacy or other claims treatment separate from the discussion of privilege against the defamation claim, and none is offered here. Presumably, the nature of the privacy claim in the present case is one of the plaintiff being placed in a "false light", with the interest protected being "reputation", similar to a defamation action. *Zacchini* v. *Scripps-Howard Broadcasting Co.,* 433 U.S. 562 (1977). Petitioner concedes, as he must, that the privilege against these other claims must be no less than that available against defamation (Br. 33). See *Hotchner* v. *Costillo-Puche,* 551 F.2d 910, 913 (2d Cir.), *cert. den.,* 434 U.S. 834 (1977). It would be unthinkable to make the public's interest in open discussion dependent upon a plaintiff's selection of one or more overlapping actions under the common law.

A. Dr. Hutchinson was a public official

In *Rosenblatt* v. *Baer,* 383 U.S. 75 (1966), the Court examined alleged defamation of the supervisor of a publicly owned recreation area, and provided general guidelines for determining when an individual should be classified as a "public official" (*id.* at 85):

> Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized. It is clear, therefore, that the "public official" designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.

Here, in reliance on the *Rosenblatt* standards, the district court found that the importance of Dr. Hutchinson't position as Director of Research at Kalamazoo State Hospital, the fact that he was dealt with as the responsible official by the federal agencies that funded his research, and that he purported to perform public works through his not-for-profit corporation, rendered him a person "in a position in government . . . [with] such apparent importance that the public has an independent interest in [his] qualifications and performance. . . ." (P. 53)

From 1968-1975, Dr. Hutchinson was employed by the Michigan Department of Mental Health as Director of Research, first at Fort Custer State Home (1968-1972), and then at Kalamazoo State Hospital.[66]

[66] "Vita" of Dr. Hutchinson, Def. Ex. 62. His public employment extends continuously back to 1959, with one brief interruption between 1960 and 1961. This employment includes Medical Research Associate at Anna State Hospital, 1959-60 and 1962-66; the

More than simply being in charge of the departments, however, he was the individual for whom the departments were created, the individual who selected and supervised the personnel working in the departments, and the individual responsible for obtaining and directing the use of both state and federal funding on projects selected by himself. (Hutchinson Depo. pp. 22-23, 26-28, 31.) When state administrators were reluctant to approve proposed work under a private Phillip Morris grant, Dr. Hutchinson established a private foundation with himself as president and proceeded to accept the grant and pursue that project using state facilities and research department personnel (A. 98). Although tacit authority over the department remained with other state officials, the state audit of the department found in fact that the absence of any mechanism for supervision resulted in ". . . the director of the Research department [Hutchinson] developing his program and functioning as an autonomous entity" (A. 97; see also Def. Ex. 76).

The scope and size of Hutchinson's operation has already been reviewed: approximately a million and a half dollars of federal and state funds obtained, another $4.7 million dollars in proposals, all conceived, initiated, operated and controlled by Hutchinson (A. 96, 306-309, 312). With fractionalized oversight divided among five federal agencies and two state departments, none of which apparently had a grasp of the

U.S. Public Health Service, 1961-62; Assistant Professor at Southern Illinois University, 1963-68; Associate Professor at Western Michigan University, 1966-73; Research Director, Fort Custer State Home, 1968-72; Director of Research, Kalamazoo State Hospital, 1972-1975. (*Ibid.*)

research department's activities, Hutchinson was virtually answerable to no one.

Petitioner was the prime mover in an operation that cost the public roughly a million and half dollars. It cannot seriously be urged that the public funds are received without a right of public review. Yet, if such review is to be meaningful, it cannot take place in a vacuum; it must of necessity involve where the money goes and for what. As the official responsible for making all of these determinations, Dr. Hutchinson was invested with a degree of influence such that the public had a legitimate interest in his qualifications and performance.[67]

It is certainly true that the "governmental affairs" over which Dr. Hutchinson exercised responsibility were not mainstream, political activities broadly felt across the breadth of state government. But they were, nevertheless, publicly supported undertakings of the state in an area of acute interest to many, and neither this Court nor the lower courts have thought it desirable to carve out areas of government where people of responsibility are freed from scrutiny. See *Time, Inc.* v. *Pape*, 401 U.S. 279 (1971) (deputy chief of de-

[67] The close connection between control over public funds and "public official" status was echoed by Chief Judge William Nealon of the Middle District of Pennsylvania in *Rusack* v. *Harsha*, Civ. No. 77-1137 (M.D.Pa. Dec. 14, 1978), concluding that a naval contracting officer was a public official: "Assuming that plaintiff is not involved with the administration of the contracts, it is nevertheless evident that he is intimately involved in the expenditures of public funds, a matter of great importance so that there is an interest in his qualifications and performance beyond the interest which might be associated with any governmental employee. He is, therefore, a public official . . ." Slip Op. at 23, 24.

tectives for city police department); *Adey* v. *United Action for Animals,* 361 F.Supp. 457 (S.D. N.Y. 1973) *aff'd* 493 F.2d 1397 (2d Cir.), *cert. denied* 419 U.S. 842 (1974 (research scientist employed at NASA); *Gallman* v. *Carnes,* 254 Ark. 987, 497 S.W.2d 47 (1973) (university professor and assistant dean); *Bishop* v. *Wometco Enterprises, Inc.,* 235 So.2d 759 (Fla.App. 1970) (city investigator); *Ryan* v. *Dionne,* 28 Conn. Supp. 35, 248 A.2d 583 (1968) (city's delinquent tax collector); *Turley* v. *W.T.A.X., Inc.,* 94 Ill.App.2d 377, 236 N.E.2d 778 (1968) (professional architect and engineer designing city buildings) and *Silbowitz* v. *Lepper,* 55 Misc. 2d 443, 285 N.Y.S.2d 456 (Sup. Ct. 1967) (supervisor of branch post office). Because of the large degree of responsibility Dr. Hutchinson enjoyed over a not insubstantial area of government activity the district court was plainly correct in determining him to be a "public official" subject to the *New York Times* rule.[68]

B. Dr. Hutchinson was a public figure

Both lower courts considered and, on their own reviews of the record, concluded that Dr. Hutchinson was a "public figure" for purposes of discussing public funding of his work. The district court found (P. 52):

> Given Dr. Hutchinson's long involvement with publicly-funded research, his active solicitation of federal and state grants, the local press coverage of his research, and the public interest in the expenditure of public funds on the precise activities

[68] Determination of "public official" and "public figure" status is a question of law to be decided by the trial judge in the first instance, *New York Times Co.* v. *Sullivan, supra; Rosenblatt* v. *Baer,* 383 U.S. 75, 88 (1966).

> in which he voluntarily participated, the court concludes that he is a public figure for the purpose of this suit.

The court of appeals reached the same conclusion (P. 80-81):

> Here, there is no question that Dr. Hutchinson had actively solicited federal grants to pursue his research and had secured a substantial amount of public funds by his applications. (Defendants' Exhibits 82b, 83). The plaintiff had also published numerous articles regarding his work (Plaintiff's Exhibits 64-96), and stories regarding his research had appeared several times in local papers. (Defendants' Exhibits 47-51). In addition to his public status as to his research, it is evident from the record that plaintiff had sufficient access to the media to rebut any defamatory falsehood. Dr. Hutchinson's answering press release was quoted in detail in the same stories which initially reported the Golden Fleece Award. (Plaintiff's Exhibits 32-39). Thus, Dr. Hutchinson had the appropriate status and access to the means of rebuttal to be considered a public figure with regard to the propriety of his research.

Both determinations were clearly correct applications of the law. In *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323 (1974), the Court drew a clear distinction between public and private figures for recovery for defamatory falsehood, and advised that public figure status must be resolved by reference to "the nature and extent of an individual's participation in the particular controversy in question", *id.* at 352. Where, as here, a plaintiff did not possess general fame or notoriety, the test is whether "an individual voluntarily injects himself or is drawn into a particular public controversy

and thereby becomes a public figure for a limited range of issues". *Id.* at 351. *Time, Inc.* v. *Firestone,* 424 U.S. 448 (1976) continued adherence to these principles, but instructed that not all matters of general public interest should be considered the sort of "public controversy" that justifies terming its participants "public figures".[69]

Both Petitioner and the American Psychological Association and American Association for the Advancement of Science as *amicus curiae* have launched a frontal attack on the protections afforded the First Amendment under these holdings by insisting that an individual's voluntary *participation* in a public controversy is insufficient to confer public figure status; rather, the only public figures are alleged to be those whose participatory role is one of *advocacy,* engaging the public attention to urge a yea or nay position on the controversy in question.[70] Thus, Dr. Hutchinson could not be a public figure simply because he solicited and obtained substantial government funds; it would also be necessary that he publicly advocate that his receipt of funds was good or bad. Such analysis completely strips the *Gertz* and *Firestone* opinions of their supporting rationale, and would *sub silentio* overrule the vast bulk of existing precedent in this area.

The principal justification for according public figures lesser protection against public discussion than is

[69] The *Firestone* language differed only slightly from *Gertz,* declining to find Mrs. Firestone a limited issue public figure because "she did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it". 424 U.S. at 453.

[70] Petitioner's Br. p. 39; Br. of *amicus curiae* at p. 15.

enjoyed by private persons is that public figures "might be assumed to 'have voluntarily exposed [themselves] to increased risk of injury from defamatory falsehood.'" *Time, Inc.* v. *Firestone, supra,* 424 U.S. at 456. It is true that assuming an advocacy role on the ultimate merits of a controversy is one manner of participation in the controversy that will invite attention and comment. But it is only one. Where public attention has voluntarily been invited by other actions, the logic of the *New York Times* rule equally applies, and the courts have so held.[71]

The public figure's participation in the controversy must, ordinarily, be voluntary. Here, because of Dr. Hutchinson's long and voluntary involvement with publicly funded research, his solicitation of millions of dollars in government grants, and the willing exposure of his work, both through his own writings and contacts with the press, the courts below properly found this element met.[72]

[71] Coach Butts did not attain public status by publicly debating his actions as a football coach; he did it by coaching football, *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967). Similarly, Rosanova never sought to stimulate public discussion of his reputed gangland activities—but he nevertheless engaged upon a course of conduct bound to invite attention and comment in an area of legitimate public concern, and was thus properly considered a public figure. *Rosanova* v. *Playboy Enterprises, Inc.,* 580 F.2d 859 (5th Cir. 1978). See also the cases collected in Bamberger, *Public Figures and the Law of Libel, A Concept in Search of a Definition,* 33 BUS. LAW 709 (1978), where the author strongly rejects the "advocacy" definition suggested by Petitioner.

[72] Petitioner raises the novel argument that his solicitation of public funding was no more voluntary than Mrs. Firestone's resort to the judicial process, because—as a practical matter—he could not pursue his research without funding just as she could not terminate her marriage without instituting divorce proceedings.

The nature of the controversy—here, use of public funds—must also be scrutinized to determine whether it is properly a "public controversy" that warrants terming the participants in it "public figures", *Time, Inc.* v. *Firestone, supra.* To ask the question here is to answer it: there are few subjects more acutely of legitimate public concern than that of public expenditures. The merit of publicly funding the studies conducted by Petitioner is properly a subject of public discussion if the public is expected to pay for it.[73]

The nexus between public funding and public figure status is denied both by Petitioner and by *Amicus* APA, with the claim that this would adversely open to broad discussion virtually all civil servants, scholarship students, and welfare recipients.[74] But this exag-

(Br. 38) The analogy is entirely inappropriate. The state does force resort to the courts to resolve some matters of fundamental importance, and thus access is constitutionally protected, *Boddie* v. *Connecticut*, 401 U.S. 371 (1971), whereas access to the public coffers for private benefit is plainly not forced at all, *Wyman* v. *James, supra*, 400 U.S. at 324.

[73] Dr. Hutchinson characterizes his activity as simply "submitting confidential, grant applications" (Br. p. 35). While it is true that the *applications* are initially confidential, 45 C.F.R. § 612.9, Petitioner omits mention that this confidence is provided *only prior to an award*. Once the project is approved and funded by the government, it becomes a matter of open public record reported both to Congress and the general public. 45 C.F.R. § 612.8. Further, agency contracts themselves urge the widest practical and appropriate dissemination of research results, suggest contributions to various public journals, and often require extra copies of reports for greater availability.

[74] Petitioner's Br. p. 42; *Amicus* Br. p. 18. In support, Dr. Hutchinson seeks to minimize the amount of funding involved by discussing only those funds personally received *in his name*. (Br. p. 35). It is beyond dispute, however, that the bulk of the $1.5

and gloss of the nature of public expenditures does little to clarify the issue. Obviously, the individual funding of a single unique project is different than incidental receipt of a government pension check. In the latter case, the recipient is most often an indistinct member of an amorphous class, and there is little need to focus attention on the individual in order to discuss the merits of public spending in that area. In cases such as the present, however, decisions to spend millions of dollars are inextricably bound to questions of the qualifications and performance of the individual directing use of the funds. We do not maintain that any receipt of public funds confers "public figure" status. But civil servants and others drawing fixed stipends or performing established tasks cannot compare with an independent entrepreneur, individually seeking large amounts of government resources for projects initiated and controlled by himself.[75]

The courts below also properly considered other factors as contributing to the conclusion that Dr. Hutchin-

million in funding received was sought and obtained under the name of one or another institution whose research department was controlled and directed entirely by Dr. Hutchinson (p. 11, *supra*). These funds are no less at issue.

[75] *Amicus* also claims that using the solicitation of public funding as a criterion in determining public figure status will serve as a disincentive to those desiring public support, and that this chill of desirable activity was an evil recognized by *Gertz*. (*Amicus* Br. at 16). But *Gertz* was concerned with intimidation of lawyers by allowing wide-open discussion of affairs (political beliefs and actions) *unrelated* to their conduct in the cases they handled. Here, there is no such extraneous discussion. We further suggest that the APA's claim that research scientists will be chilled from seeking public support if the public is allowed to criticize this funding gives insufficient credit to the dedication and general integrity of the scientific community.

son was a public figure; namely, that through publication of numerous articles about his work and through interviews and contacts with the press, Dr. Hutchinson invited public recognition and attention to his work. While the bulk of his own publications might have little appeal to the general reading public, there is no contention that his work on aggression turned Hutchinson into a household name. But by publishing over forty articles and four books relating to his work (Pl. Exs. 46-96; Def. Ex. 62), many under public grants (A. 313-314) requiring public distribution,[76] Hutchinson put his work on public review and invited attention to his studies. Such public discussion and dissemination of ideas is, in fact, the very reason that the government makes research funds available. To publish under these accepted terms is to take the risk that the work will not be liked, or be thought to be worthless and a poor use of money.

The same is true of the news releases routinely given to the press about his work. Although the attendant publicity was not always given front page treatment, Hutchinson or his state agency were still actively seeking favorable publicity and inviting comment about the programs and studies concerning which he now seeks to foreclose comment.[77] And when front page treatment

[76] Congress established the National Technical Information Service (NTIS) to act as a clearinghouse making information generated under public contract available to the public, 15 U.S.C. § 1152. The stated purpose of the clearinghouse is to make such information widely available, 15 U.S.C. § 1151. It was from NTIS' weekly publication that Schwartz learned of Hutchinson's work.

[77] Hutchinson's newspaper exhibits and clippings drawn from papers of general circulation indicate the constant attempts made to draw attention to his work. The subjects of the articles include: announcement of study grant from NIMH, December 1, 1966 (Def. Ex. 47); announcement of NSF grant, November 1, 1968 (Def. Ex. 48); announcement of research grant from NASA, April 25, 1968 (Def. Ex. 49); announcement of new position as Director of Research, January 16, 1971 (Def. Ex. 50); announcement of publication of new book, May 18, 1973 (Def. Ex. 51); announcement of new grant from NSF, January 21, 1973 (Def. Ex. 52); announcement of publication, April 27, 1973 (Def. Ex. 54); and a front page, detailed interview conducted with Hutchinson, including photographs, December 8, 1974 (Def. Ex. 55).

was given in local papers to an interview discussing his research work and funding activities, Hutchinson did not hesitate to spread the publicity by having the article sent to funding agencies (Def. Ex. 78).

Moreover, Petitioner completely fails to address the widespread attention and publicity independently focused on his activities and use of public funds by the State Audit of his research department publicly released May 8, 1975.[78] That report centered almost entirely on Dr. Hutchinson's activities, and alleged among other things, improper management of the research department and misappropriation and mishandling of public funds and supplies (A. 97-108). Coverage of the audit's findings, as well as the state action in terminating the research department, was distributed by Associated Press and other news agencies and was widely reported.[79]

[78] The audit covered the years 1968-1974, and was completed prior to any public notice of Senator Proxmire's intention to criticize the funding of Hutchinson's work. (Hutchinson Depo. p. 98). A preliminary report had been circulated to state government officials the same day the Golden Fleece was announced (*id.* at 99-100), and was publicly released in final form some three weeks later.

[79] See Def. Exs. 56-61, 104-105, A. 109-128. To claim that the audit report only received widespread coverage because of the previous Golden Fleece award is disingenuous. The report's conclusions were extremely colorful, and presented the sort of "public exposé" that is not easily passed over by the press.

The audit report, and the publicity it engendered, occurred after Senator Proxmire's press release awarding the Golden Fleece, but before the mailing of any of the newsletters to constituents, or alleged appearances on radio and television programs. Certainly, with regard to all of these later actions, the public spotlight independently cast upon Dr. Hutchinson's research activities and use of public funds opened this area of his conduct to scrutiny as a "public figure".

The final explicit rationale offered by the lower courts as supportive of the conclusion that Hutchinson was a public figure was that his established contacts with the press gave him access and an opportunity to rebut the charges made by Senator Proxmire. *See Gertz* v. *Robert Welch, Inc., supra,* 418 U.S. at 344. Dr. Hutchinon's release reached the wire services before expiration of the news embargo on the Proxmire release (until April 18 after 6:30 a.m., see P. 84), and his response is given prominent mention in the first coverage by AP, UPI, Times Wire Service, and the Washington Post (Pl. Exs. 32-39).[80]

In the limited area of publicly funded scientific research, an area admittedly of legitimate public concern, Dr. Hutchinson claims a position of pre-eminence by reason of the funds he has solicited, the articles he

[80] The APA as *amicus* claims that the Court has reduced the significance of the ability-to-rebut factor (Br. p. 20). The authority enlisted, however, is a dissent in *Time, Inc.* v. *Firestone, supra,* and *Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 344 n. 9, which in fact notes shortcomings of the self help remedy, but concludes, "But the fact that the self-help remedy of rebuttal, standing alone, is inadequate to its task does not mean that it is irrelevant to our inquiry." The Court can hardly be said to have been more recently "de-emphasizing" this factor in the very case where it was first set out.

has written, and the publicity he has sought and obtained. For limited discussion of his publicly funded research, he *is* a public figure. And it is to this area alone that Senator Proxmire addressed his remarks. The lower courts, therefore did not err in finding the evidence produced conclusive of the fact that Ronald Hutchinson was a public figure, for the contexts of this case.[81]

C. Petitioner failed to present a genuine issue of malice

The rule of *New York Times* v. *Sullivan* imposes a Constitutional protection and prohibition against recovery by public officials or public figures for defamatory falsehood unless it can be established with "convincing clarity" that the statement was made with actual malice, that is "knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80. The touchstone of malice in this specialized sense is knowledge; defendant must either have published with "a high degree of awareness of probable falsity", *Garrison* v. *Louisiana,* 379 U.S. 64, 74 (1967), or "in fact entertained serious doubts as to the truth

[81] That conclusion is amply supported by legal precedent finding such status in a broad variety of circumstances. Some examples are: *Adey* v. *United Action for Animals, Inc., supra* (a scientist involved in planning of a space flight for a monkey); *Edwards* v. *National Audobon Society,* 556 F.2d 113 (2d Cir.), *cert. den.* 434 U.S. 1002 (1977) (professors who had supported the use of pesticides); *Guitar* v. *Westinghouse Electric Corp.,* 396 F.Supp. 1042 (S.D.N.Y. 1975), *aff'd,* 538 F.2d 309 (2d Cir. 1976) (author of book); *Vandenburg* v. *Newsweek, Inc.,* 441 F.2d 378 (5th Cir.), *cert. den.* 404 U.S. 864 (1971) (track coach) and *Lewis* v. *Reader's Digest Ass'n,* 366 F.Supp. 154 (D.Mont. 1973) (a health spa operator with a claimed arthritis cure). Petitioner falls within several of these categories, including professor or scientist, and published author.

of his publication," *St. Amant* v. *Thompson,* 390 U.S. 727, 731 (1968).

Unless the evidence adduced during the summary judgment procedure demontrates that plaintiff could establish actual malice by clear and convincing proof, the court should grant ummary judgment for defendant lest the purpose of the *New York Times* privilege be defeated by prolonged litigation. *Fadell* v. *Minneapolis Star & Tribune Co., Inc.,* 557 F.2d 107 (7th Cir.), *cert. den.* 434 U.S. 966 (1977). "In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate". *Washington Post* v. *Keogh,* 365 F.2d 965, 968 (D.C.Cir.), *cert. den.* 385 U.S. 1011 (1967).[82]

Here, Judge Leighton in the district court, following Dr. Hutchinson's charges of malice, granted summary judgment because he concluded that the charges were

[82] Accord, *Guitar* v. *Westinghouse Electric Co.,* 396 F.Supp. 1042 (S.D.N.Y. 1975) *aff'd* 538 F.2d 309 (2d Cir. 1977); *Pierce* v. *Capital Cities Communications, Inc.,* 576 F.2d 495 (3rd Cir.), *cert. den.,* 47 U.S.L.W. 3224 (1978). *Bon Air Hotel, Inc.* v. *Time, Inc.,* 426 F.2d 858 (5th Cir. 1970); *Time, Inc.* v. *McLaney,* 406 F.2d 565 (5th Cir.), *cert. den.,* 395 U.S. 922 (1969); *Cervantes* v. *Time, Inc.,* 464 F.2d 986 (8th Cir. 1972), *cert. den.,* 409 U.S. 1125 (1973). These cases do not derogate the jury's function as fact finder, but do properly insist that First Amendment interests not be sacrificed to unsupported allegations. Credibility of witnesses, when at issue, will remain a question for the jury, *Agosto* v. *Immigration and Naturalization Service,* 436 U.S. 748 (1978). But a plaintiff is not entitled to continue the litigation in the mere hope of putting defendant's credibility at issue without producing sufficient evidence establishing that defendant might, in fact, have entertained serious doubts concerning the truth of his statements. A defendant's purported awareness of the facts, while subjective, must nevertheless be supported by presentation of objective facts on which such awareness or knowledge could be premised, Fed. R.Civ.P. 56(e).

without foundation (P. 55-59). The court of appeals agreed, with the added observation that some of the statements challenged ". . . constitute a personal opinion as to the value of plaintiff's work, rather than false statements of fact and thus may not be defamatory in a Constitutional sense" (P. 82, n. 15). The lower courts' approval of summary judgment was proper, because the statements challenged were either statements of opinion or readily apparent use of colloquial expression, and because the record establishes that Defendants both exercised care in investigating, and discovered sufficient evidence during their investigation to justify their beliefs as to the accuracy of all factual statements made.

In urging that summary disposition of the malice issue was inappropriate because it involves Defendants' "motive, intent, and subjective feelings", Petitioner defines "malice" in a manner totally contrary to its legal meaning.[83] This Court has repeatedly explained that malice in the *New York Times* sense deals with awareness of falsehood, and in no way involves ill will, evil motives, or an intention to injure. *National Ass'n of Letter Carriers* v. *Austin,* 418 U.S. 264, 281 (1974); *Greenbelt Cooperative Publishing Ass'n* v. *Bressler,* 398 U.S. 6 (1970); and *Rosenblatt* v. *Baer,* 383 U.S. 75 (1966). Whatever the motives or intent of Senator Proxmire and his staff, summary judgment is

[83] Petitioner's Br. p. 44. Petitioner's misconception of the meaning of "actual malice" also colors his evidentiary presentation. While a supposed "bias" against other social scientists and an alleged "past pattern of malicious defamation" might be relevant to proof of some evil intent, it is of no relevance in judging possible awareness of falsity here.

still appropriate because they had no serious reason to doubt the veracity of their factual statements.[84]

If the Senator's and his aide's awareness of falsity is to be evaluated, those statements of fact where truth or falsity is involved must be separated from the expressions of subjective opinion and literary hyperbole where truth, or the awareness of it, cannot be judicially measured. Petitioner's predominant complaint is that Senator Proxmire berated his work as "nonsense", "so-called research", exhibiting "transparent worthlessness", in spite of the fact that its value had been defended by agency officials involved with its funding.[85] But a court cannot adjudicate, as Petitioner asks

[84] The authority offered by Petitioner to suggest that summary judgment should not be used when "malice" is claimed is indicative of the fallacy in the argument. The only Supreme Court authority presented, *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), had nothing whatever to do with summary judgment on the "actual malice" issue, but rather advised that "summary procedures should be used sparingly in *complex antitrust litigation where motive and intent play leading roles . . .*" *id.* at 473 (emphasis added). While the Fifth Circuit did affirm a denial of summary judgment in *Vandenburg* v. *Newsweek, Inc.*, 441 F.2d 378 (5th Cir.), *cert. den.*, 404 U.S. 864 (1971), the same court later upheld judgment n.o.v. granted by the trial court on the malice issue, *Vandenburg* v. *Newsweek, Inc.*, 507 F.2d 1024 (5th Cir. 1975), and that Circuit has expressed its commitment to protecting First Amendment interests through use of summary procedures. See n. 82, *supra*. The lengthy quote from *Goldwater* v. *Ginzburg*, 261 F.Supp. 784 (S.D.N.Y. 1966) is of minor significance as that decision, on appeal, was replaced with a Second Circuit opinion which acknowledged the First Amendment interests in summary disposition, but simply concluded that it was not appropriate on the facts of that case. *Goldwater* v. *Ginzburg*, 414 F.2d 324, 337 n.21 (2d Cir. 1969), *cert. den.*, 396 U.S. 1049 (1970).

[85] Petitioner's Br. 47-48. In any event, the denials of wasteful spending by officials concerned with a Senator's criticism would be insufficient to establish malice. "Surely liability under the 'clear

it to do, whether Respondents properly viewed the scientific merit of his work. The thread throughout Petitioner's argument is value, worth, merit—all subjective opinion beyond the scope of a justiciable issue.

Whether the Senator's expressions of opinion concerning Dr. Hutchinson's work is protected by the state's common law "fair comment" privilege,[86] or by the constitutional privilege deriving from *New York Times*, it is plain that the courts are not a proper forum in which to debate the "worth" of his research. As was said in *Gertz* v. *Robert Welch, Inc., supra* at 339-340; "However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." Similarly, using hyperbole or epithet in accusing one of "blackmail", *Greenbelt Cooperative Publishing Ass'n* v. *Bressler, supra,* or naming an individual as a "scab" who would sell "his birthright, country, his wife, and his children . . ." is non-actionable rhetoric rather than false statement of fact, at most a "lusty and imaginative expression of the contempt felt," *National Ass'n of Letter Carriers* v. *Austin,*

and convincing proof' standard of *New York Times Co.* v. *Sullivan* cannot be predicated on mere denials, however vehement. Such denials are . . . commonplace in the world of polemical charge and countercharge . . ." *Edwards* v. *Nat'l Audobon Society, supra,* 556 F.2d at 121.

[86] That privilege is applicable both in the Michigan and District of Columbia jurisdictions, *Nuyen* v. *Slater*, 372 Mich. 654, 127 N.W.2d 369 (1964); *Bostetter* v. *Kirsch*, 319 Mich. 547, 30 N.W.2d 276 (1948); *Fisher* v. *Washington Post Co.*, 212 A.2d 335 (D.C. App. 1965); *Alfred A. Altimont, Inc.* v. *Chatelain, Samperton & Nolan*, 374 A.2d 284 (D.C.App. 1977). *See also*, RESTATEMENT (SECOND) OF TORTS, § 566 (1977). It protects expressions of opinion on matter of public interest.

supra, 418 U.S. at 286. Quite simply, "An assertion that cannot be proved false cannot be held libellous. A writer cannot be sued for simply expressing his opinion of another person, however unreasonable the opinion or vituperous the expressing of it may be." *Hotcher* v. *Castillo-Puche,* 551 F.2d 910, 913 (2nd Cir.), *cert. den.* 434 U.S. 834 (1977). It at least seems clear that *New York Times* meant to foreclose evaluation of such opinions in the context of defamation suits.[87]

Once the world of opinion is separated from that of fact, it becomes clear that Respondent's investigation had produced ample evidentiary support for each and every of the purported factual misstatements attributed to them, and thus, as a matter of law, no actual malice can be shown.[88] It must be emphasized that many of the purported factual misstatements, such as the statement that Dr. Hutchinson's projects were "perhaps duplicative and that he was the recipient of

[87] In reference to criticism of an individual's published work, this principle was long ago expressed in *Carr* v. *Hood,* 1 Campb. 354, 357 (1808):

> We really must not cramp observations upon authors and their works. They should be liable to criticism, to exposure and even to ridicule, if their compositions be ridiculous; . . . Show me an attack on the moral character of this plaintiff, or any attack upon his character unconnected with his authorship, and I shall be as ready as any judge who ever sat here to protect him, but I cannot hear of malice on account of turning his works into ridicule.

[88] Petitioner has apparently abandoned the earlier position that malice could be demonstrated because of a failure to adequately investigate, adopting in his Brief p. 51, n.20 the district court finding that ". . . the Defendants spent many hours investigating and verifying their information." See also Petitioner's Br. p. 47 n.18. Failure to investigate, even if claimed, would not establish actual malice, *St. Amant* v. *Thompson,* 390 U.S. 727 (1968).

the funding, appear only in the initial release and newsletter, and are not repeated in the later newsletter, or radio and television appearances.[89] Petitioner's presentation of the "malice" issue, therefore, cannot apply to these other publications or statements.

It is alleged that malice might be demonstrated because Senator Proxmire termed Dr. Hutchinson's research projects for various agencies to be "perhaps duplicative" in spite of his staff's knowledge of the existence of a 1972 ONR memorandum finding no overlap between a certain two of Hutchinson's many projects.[90] This, of course, does not completely review Petitioner's work. Agency critiques of rejected applications obtained by the Senator's office contain statements about Dr. Hutchinson's on-going activities, and they *do* evidence concern about the similarity and duplication of Hutchinson's studies.[91]

One primary example of this is the explanation by the Experimental Psychology Research Review Committee in HEW of its rejection of one proposal. Among some complimentary remarks, the committee advised that its rejection was based in part on the conclusion that (Def. Ex. 90):

> Much of the proposed work was felt to consist of refinements on experiments already performed

[89] See A. 171. No record of the alleged radio appearances has ever been produced, and what, if any, defamatory remark may have been made by the Senator is unknown. A. 304-305.

[90] A. 72-73.

[91] Petitioner suggests that these critiques are meaningless as they were issued in connection with agency rejection of proposed projects. But the critiques clearly review Hutchinson's existing work under funded projects, and describe his actual operations.

and represented little more than an attempt to control for one or another loose end that remained in the earlier work.

* * *

Concern was also expressed because a considerable amount of the proposed work was already apparently being funded by other agencies.

The conclusion was "Considering the diversity of projects and these investigators' *already apparent tendency to overly fragment their work (especially Dr. Hutchinson)* it was felt that support was not warranted at this time." (emphasis added)

In 1974, HEW criticized another Hutchinson proposal, this concerning "Analysis of Noxious Stimulus Produced Alcohol Intake", commenting (A. 57):

> The bulk of the proposal contains studies which are preliminary, and could have been done earlier, especially since you have done *many similar studies* using other drugs. Thus, the basic paradigm should already be well established . . . (emphasis added)

When scientific reviewers complain of an "already apparent tendency to overly fragment their work" and "many similar studies", an expression that the work is "perhaps duplicative" cannot even approach the reckless disregard of truth required by *New York Times*. Even given the existence of other statements to the contrary, the adoption of one possible interpretation based on the documents from the several that could be made is not enough to create a jury issue of malice, *Time, Inc.* v. *Pape*, 401 U.S. 279, 290 (1971).

The second area of allegedly known factual misstatements concerns the statements that "all of this

money [the $500,000] was given to Hutchinson" and that Hutchinson had "made a fortune from his monkeys."[92] Attributing the funding directly to Hutchinson rather than listing the names of his various research institutions is—admittedly—an abbreviated style of identifying a grant recipient, but one that reasonably depicts the funding situation. The government grants all list Hutchinson as principal investigator, and place the funds under his control, supervision, and direction. When Hutchinson moved from location to location—Fort Custer, to Kalamazoo State Hospital, to the Foundation for Behavioral Research—the funds were transferred as well. Moreover, in speaking of other "principal investigators", Hutchinson casually speaks of them as being funded rather than fully identifying their universities or associations through which they received funding.[93]

To the extent that the "fortune from his monkeys" statement is anything more than hyperbole, it is a reasonable evaluation of the facts reviewed by the Senator's office. As explained both by Senator Proxmire and Morton Schwartz, this statement was a reflection of the fact that Hutchinson had been placed in a position of great status, income and power over substantial funding by virtue of his work with monkeys, earning a salary among the top percentage of incomes in the country.[94] The great discretion which Hutchinson was able to exercise over use of the money placed at his disposal is attested to by the state audit report.[95] While "for-

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[92] Petitioner's Br. 49.

[93] Hutchinson Depo., p. 208.

[94] A. 210, 226-227.

[95] A. 95-108.

tune" may mean different things to different people, it is not obviously inappropriate when applied to these circumstances.

The last challenged factual statements were those made by Mr. Schwartz during the course of his discussions with agency officials. Specifically, Petitioner alleges malice in Schwartz's "misrepresentation" of Hutchinson's approval rate at NIMH, as well as his purported statement that Hutchinson had been terminated for mismanagement of funds.[96] Again, there was strong evidence supporting these statements. While Hutchinson had assisted other principal investigators on NIMH-funded projects under a graduate fellowship, his own proposals were repeatedly withdrawn, or rejected by that agency. One project was eventually approved in 1974, but was not funded until after the "Fleece" in 1975, and thus did not appear in funding records supplied to Schwartz.[97]

The connection between Hutchinson's misuse of funds alleged in the state audit report and his subsequent termination was prominently declared by statements in the press, including such headlines as "Strange Expenses at Hospital Get Researcher Fired" [98] and "Bargain Days Cost State Researcher His Job".[99] Additionally, Hutchinson himself in his

[96] Petitioner's Br. 10, 14.

[97] This information was gathered by Schwartz by checking computer print outs of agency funding, and by checks with agency officials (A. 191-192). It was known that Petitioner had submitted several applications to NIMH (A. 310), and it was also known that prior to the Fleece, that agency had not funded any of Hutchinson's projects (A. 312).

[98] Detroit Free Press, May 9, 1975, A. 114.

[99] Detroit News, May 9, 1975, A. 115.

state Civil Service appeal has claimed that he *was fired* based on what might have been cause, not for the budgetary reasons put forth by the state.[100] Schwartz's relay of this information to NSF was certainly based on reasonable interpretation of the information available to him.

It is true that Senator Proxmire and his staff assistants presented a critical synopsis of Hutchinson's work, and did not give encyclopedic coverage to the full range of his studies. Dr. Hutchinson states that a proper presentation of criticism would take no less than an hour of oral presentation, and more to write.[101] If this "precision" standard were law, he would have successfully immunized himself from all but accolades. But the law neither recognizes this as desirable, nor insists that it be done. The record clearly supports the findings of the courts below that defendants were prudent in investigating the facts, and uncovered sufficient information to justify the beliefs expressed in their affidavits that all factual statements made by them were true.[102] The sum total of Petitioner's exposition of malice thus falls far short of that sufficient under *New York Times* to allow the case to go to a jury.

[100] Def. Ex. 111. The state litigation has still not concluded.

[101] A. 253.

[102] A. 145, 158.

CONCLUSION

For the foregoing reasons, Respondents William Proxmire and Morton Schwartz pray that the judgment of the court of appeals be affirmed.

Respectfully submitted,

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FOR ARGUMENT

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OCTOBER TERM, 1978

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Petitioner,

v.

WILLIAM PROXMIRE and MORTON SCHWARTZ,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PEITIONER'S REPLY BRIEF

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PEITIONER'S REPLY BRIEF

THE RESPONDENTS HAVE MISREPRESENTED THE ISSUES IN THIS CASE AND HAVE IMPROPERLY RAISED ADDITIONAL QUESTIONS NOT PRESENTED IN THE PETITION FOR CERTIORARI

Questions Presented in the Respondents' Brief are not the questions presented in this case:

1. The Respondents' first question presented was as follows:

> "1. Under the Speech or Debate Clause, may a United States Senator criticize public spending in

> Congressional statements repeated in a press release and discussed in constituent newsletters without being subject to suit by the recipient of that spending?" (Br. 1)

The language of this first question contains at least three misleading implications. First, the phrasing of the Speech or Debate issue indicates that a Senator's right to criticize public spending is in dispute. The record will reflect, however, that the real issue is not whether a Senator may criticize public spending, but whether an individual Senator, acting outside the halls of Congress, enjoys unrestricted and absolute immunity to engage in the wide-spread publication of malicious defamation regarding a private individual.

The second misleading aspect of the Respondents' first question is the reference to "Congressional statements." For the sake of clarity, it should be emphasized that the Petitioner has never challenged Respondent Proxmire's right to insert his defamatory press release into the *Congressional Record,* nor has he challenged any committee hearings, voting or other legislative activities. On the contrary, the present case is concerned only with the Respondents' publicity releases, press interviews, political newsletters, defamatory phone calls and appearances on television and radio talk shows.

The third error in this question concerns the reference to "Congressional statements repeated in a press release." This phrase confuses the true chronology of publication by misrepresenting the press release as being a subsequent republication of the alleged Senate floor speech. In fact, it is undisputed that the press release was actually distributed to the news media approximately three days prior to the date that it was

either read on the Senate floor or handed to the Clerk for insertion into the *Congressional Record.* (A.167). Thus, the press release constituted the original publication of the Respondents' defamatory remarks, rather than a republication of his floor speech, if any. It is the Petitioner's contention that the chronology of publication reveals that the alleged floor speech was merely an attempt to add substance and immunity to a personal publicity release. Of course, Speech or Debate immunity would not be available to the Respondents even if the press release had been distributed after its insertion into the *Congressional Record. Doe* v. *McMillan,* 412 U.S. 306, 314 (1973). In the interest of accuracy, however, the true chronology of publication should not be confused.

2. The Respondents' second Question Presented raised the following issue:

> "2. Did the Court of Appeals err in finding that investigation and oversight by a United States Senator and his aide into the extent and justification of agency spending is not legitimate legislative activity, immune from question under the Speech or Debate Clause?" (Br. 2)

This issue is not properly before this Court. Supreme Court Rule 23(1)(c) provides in pertinent part that "only the questions set forth in the Petition [for Writ of Certiorari] or fairly comprised therein will be considered by the Court." In the instant case, the only question regarding Speech or Debate immunity which was presented in the Petition for Writ of Certiorari was the following:

> "Are the press releases and newsletters of a member of Congress entitled to absolute immunity un-

der the Speech or Debate Clause of the United States Constitution?" (P. 2)

The above-cited question is clearly restricted to the Respondents' press releases and newsletters and does not extend to the Respondents' other conduct which the Court of Appeals found to be outside the scope of Speech or Debate immunity. Therefore, under the terms of Supreme Court Rule 23(1)(c), the Respondents' second Question Presented is not properly before this Court.

Furthermore, there is abundant authority for the proposition that a respondent who fails to Cross-Petition for Certiorari may not attack the judgment below for the purpose of obtaining a modification in his favor. *See e.g., United States* v. *Storer Broadcasting Co.,* 351 U.S. 192; *NRLB* v. *Express Pub. Co.,* 312 U.S. 426; *Le Tulle* v. *Scofield,* 308 U.S. 415, *reh. den.* 309 U.S. 694; *Alexander* v. *Cosden Pipe Line Co.,* 290 U.S. 484; *Lucas* v. *Alexander,* 279 U.S. 573; *Terminal R. Asso.* v. *United States,* 266 U.S. 17; *Bothwell* v. *United States,* 254 U.S. 231. In total disregard of this well-established principle, the Respondents' have dedicated a substantial portion of their Brief to a discussion of Respondent Schwartz's tortious phone calls and the so-called "investigative function" of Congress. In the absence of a Cross-Petition for Certiorari, that portion of the Respondents' Brief and the corresponding sections of the Amicus Briefs should be disregarded. In light of this Court's authority to consider even those issues which are not properly presented by the parties, however, a responsive section addressing this issue has been included in this Reply Brief.

3. In addition to overstatement, the Respondents' third Question Presented also attempts to raise a new question not presented in the Petition for Writ of Certiorari. Even though the Petition, as well as the Court of Appeals Decision and the Petitioner's Brief, did not address the issue of Dr. Hutchinson's possible status as a "public official," the Respondents' have attempted to raise this issue in addition to the "public figure" issue which is properly before the Court. In accordance with the authorities cited on page 4 of this Brief, the portion of the Respondents' Brief which addresses the "public official" issue should be disregarded. Again, however, a responsive section has been included in this Reply Brief for reference in the event that this Court decides to address the issue.

4. The Respondents' fourth Question Presented reads as follows:

> "4. Is a material issue of 'actual malice' presented where the allegedly defamatory remarks are either expressions of opinion, or obviously colloquial language, reasonably descriptive of the factual situation described?" (Br. 2)

This question completely misrepresents the malice issue presented in the instant case. First of all, the Respondents have conveniently overlooked the evidence demonstrating their past pattern of malicious defamation in connection with the "fleecing" of social scientists. Secondly, their statement of the issue fails to even mention their awareness of the truth and their admitted knowledge of the falsity of some of their statements. Third, it is a distortion of the facts to indicate that all of the Respondents' defamatory remarks were either "expressions of opinion or obviously colloquial language, reasonably descriptive of the factual situation

described." It certainly was not "opinion or obviously colloquial language, reasonably descriptive of the factual situation" to essentially charge Dr. Hutchinson with fraudulently obtaining funding for "duplicative" research projects, especially when the charge was totally unfounded. (P. 85). Similarly, it was not "opinion or obviously colloquial language, reasonably descriptive of the factual situation" for Proxmire to grossly distort the nature and extent of Dr. Hutchinson's research by falsely alleging that "the Government paid a half million dollars to find out that anger, stopping smoking, and loud noises produce jaw clenching in people." (P. 84). In fact, none of the defamatory falsehoods or ridicule involved in Dr. Hutchinson's Complaint should be dismissed as "reasonably descriptive" opinions or colloquialisms. Consequently, the fourth "Question Presented" in the Respondents' Brief, just as the preceding three questions, should be disregarded in favor of the actual questions set forth in the Petition and supported in the record below.

THE RESPONDENTS' STATEMENT OF THE CASE IS INACCURATE

Much of the artful hyperbole and selective reporting contained in the Respondents' slanted presentation of the facts does not merit a detailed response since the actual facts are accurately set forth in the Petitioner's Statement of the Case.[1] Some of the Respondents'

[1] For example, the record clearly reveals that the initial document which the Respondents issued to the news media was a publicity release laden with sarcastic ridicule, rather than a scholarly "report" as the Respondents have alleged. (Br. 3). Similarly, the Respondents' unqualified assertion that "the speech was delivered on the floor of the Senate" (Br. 4) is inconsistent with Proxmire's deposition testimony that he is not certain whether he actually read his press release on the floor of the Senate or merely handed it to the Clerk for insertion into the *Congressional Record*, although he presumes he read it on the floor. (A. 220-221; 234-235).

Statements, however, are sufficiently misleading to warrant the following comments:

1. On page 4 of their Brief, the Respondents indicate that their press release "accurately identifies" the research findings in connection with Dr. Hutchinson's work.[2] Contrary to this unsupported assertion, the Respondents' description of Dr. Hutchinson's research findings was a complete travesty. (A. 282-285; 287-298). In fact, one of the primary bases for the Petitioner's initial Complaint was that the Respondents knowingly and maliciously misrepresented his research in order to facilitate their caustic ridicule.[3]

2. Immediately following their unsupported assertion of factual accuracy, the Respondents state that, "to that factual base, Senator Proxmire added his opinion that the grants were wasteful, worthless and an inappropriate expenditure of Government Funds." (Br. 4-5). This description of the press release is so incom-

[2] The Respondents also claim to have "accurately identified" the cost figures, but many of the figures in the release (p. 84-86) are not even consistent with the figures contained in the Respondents' own exhibits purporting to describe Dr. Hutchinson's funding. (A. 306-309; 312). For example, Respondents' Trial Exhibit 83 contradicts the press release with respect to the amount of Dr. Hutchinson's first National Science Foundation (NSF) Grant, the date of the second NSF Grant, the amount of the third NSF Grant and the total figure for funding provided by ONR (A. 312).

[3] The true nature of Dr. Hutchinson's research was explained in the agency reports which were received and reviewed by the Respondents prior to the issuance of their press release (See Petitioner's Brief, pp. 7-9).

plete as to be unconscionable. The text of the press release (P. 84-86) clearly reveals that the Respondents also charged the Petitioner with personally receiving almost $500,000.00 in Government Funds, with "grantsmanship," with making "a fortune from his monkeys," with making "a monkey out of the American taxpayer," with spending "a half million dollars to find out that anger, stopping smoking, and loud noises produce jaw clenching in people" and with obtaining funding for projects which were "perhaps duplicative." (P. 84-86). These defamatory allegations of improper and perhaps illegal activity extend far beyond any mere statement of opinion that the grants were wasteful and inappropriate.

3. On page 5 of their Brief, the Respondents state that, "the press release was sent to the Senate Service Department on April 15, 1975 for review and approval of its content in conformance with Senate Rules." This statement is somewhat misleading in that it falsely implies that the Senate Service Department made some attempt to verify the accuracy and/or non-defamatory nature of the Respondents' press release or otherwise endorse the release as an official publication of the entire Senate. In fact, the Senate Service Department undertook no such effort, but merely reviewed the press release for conformity with the Senate's Franking Regulations. (P. 28).

4. The Respondents state, on page 5 of their Brief, that, "the release date of the press release was not until the morning of April 18, 1975, the same date of the Senate speech." This reference to the "release date" *printed* on the press release is technically correct,

but one of Proxmire's own staff members has admitted that the press release was *actually* released on April 15, 1975. (A. 167).

Knowledge of this actual release date should also dispel the false impression, created by the Respondents, that Dr. Hutchinson distributed his responsive press release prior to the dissemination of Proxmire's release. (Hutchinson Depo., p. 154).

5. Also on page 5 of their Brief, the Respondents address the telephone conference between Dr. Hutchinson and Morton Schwartz prior to the issuance of the press release. According to the Respondents, Hutchinson reviewed the release and then merely "objected generally to what he considered the unfair evaluation of his work." This summary neglects to point out that Dr. Hutchinson said, "the entire release is a travesty or mocking of the truth. It's a total distortion . . . from beginning to end it was a falsehood." (A. 247).

6. In like manner, the Respondents assert, at page 6, that Dr. Hutchinson's responsive press release "did not challenge any of the factual statements in Proxmire's speech." Although Proxmire's floor speech, if any, is not at issue in this case, it is certainly wrong to imply that Dr. Hutchinson did not challenge any of the identical, factual misstatements contained in the Respondents' press release. In fact, the entire reply was, by its title and terms, a direct challenge to the falsity of the release. For example, Dr. Hutchinson responded to the gross mischaracterization of his research by explaining the true nature of his work. (A. 83-84). Also, in direct response to the Respondents' allegation that he may have received funding for "du-

plicative projects," Dr. Hutchinson briefly explained the agency review process and noted that "each agency is always fully informed of other support which the researcher is currently provided or which is under review. Funding by these agencies is tailored to support specific projects for which no other support is provided." (A. 84). Thus, it can hardly be said that Dr. Hutchinson's reply did not challenge the factual misstatements in the Respondents' press release.

7. According to page 6 of the Respondents' Brief, "the first press coverage of the funding issue" included "extracts of Hutchinson's release," the charge of Proxmire's "disservice to his constituents and to the country," and "statements by the agencies defending the merit of the funding." Although these statements are partially true, it is inaccurate to state that these responsive statements were included in all of the initial press coverage. The *New York Times* article of April 19, 1975, for example, made no mention whatsoever of any of the three responsive statements which the Respondents' assert were "included in the original stories." (Pl. Ex. 37).

8. In describing the various publications of Proxmire's defamatory remarks, the Respondents state that "no mention was made of Dr. Hutchinson" during the Mike Douglas television show (Br. 8). Although it is true that Dr. Hutchinson's name was not specifically mentioned on this television show as it was in the press release, the first newsletter, and the other television and radio shows (P. 84-88; Pl. Exs. 8, 9), the Respondents fail to mention the affidavits contained in the record indicating that Dr. Hutchinson was sufficiently identified so as to enable certain listeners to recognize

that he was the subject of Proxmire's defamatory ridicule. (Pl. Exs. 10, 11).[4]

9. In stating, on page 8 of their Brief, that "no texts of broadcasts are known" other than the Mike Douglas Show and the Affidavit regarding the Bob Barry Radio Show, the Respondents clearly imply that the record is devoid of any evidence regarding the substance of the other public interviews. This implication is deceptive in light of the affidavits and deposition testimony concerning the content of additional radio, television and press interviews. (Pl. Exs. 8, 9; Hutchinson Depo. p 189).

10. Near the end of the Respondents' statement of the case, they cite rather extensively to a State Audit Report which was not even released to the public until after the Respondents' press release had received nationwide publicity. The allegations contained in the Audit Report are not established findings of fact nor have they led to any criminal or civil charges against Dr. Hutchinson. In fact, Dr. Hutchinson vigorously disputes the Audit's findings and has demanded a retraction. (Hutchinson Depo. p 116). In the context of the instant case, the Respondents' repeated references to the audit are scandalous and immaterial. In fact, the Respondents themselves have admitted that the Audit was not released until after the press release had been

[4] This fact is important because, as Professor Prosser notes, "a publication may clearly be defamatory as to somebody, and yet on its face make no reference to the individual plaintiff . . . he need not, of course, be named, and the reference may be an indirect one, with the identification depending upon circumstances known to the hearers, and it is not necessary that every listener understand it, so long as there are some who reasonably do." Prosser, *Handbook of the Law of Torts*, Fourth Edition (1971), p. 749.

published and, further, that none of the Respondents' statements allude to the Audit Report in any way. (Br. 10). Thus, it can only be assumed that the Respondents' references to the Audit, as well as the other irrelevant and misleading comments inserted in the Respondents' Brief,[5] constitute transparent attempts to prejudice Dr. Hutchinson in the eyes of the Court by portraying him in a highly derogatory manner. Accordingly, these references should be disregarded.

11. As explained in a later section in this Brief dealing with the "public official" issue, the Respondents' Statement of the Case exaggerates the nature and extent of the authority exercised by Dr. Hutchinson in his civil service position with the State of Michigan.[6]

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[5] Other prejudicial irrelevancies contained in the Respondents' Brief include the reference to Dr. Hutchinson's "personal patent" (Br. 9) and the reference to the "hundreds of thousands of dollars of equipment paid for by the Government [which] were transferred to Hutchinson's private foundation." (Br. 12). Contrary to the Respondents' insinuations, Dr. Hutchinson's "personal patent" resulted from research work performed under a private grant from the Philip Morris Company. Furthermore, the patent was not granted to Dr. Hutchinson alone, but rather to four individuals as assignors to a non-profit corporation. With respect to the "transfer" of Government property to Dr. Hutchinson's foundation, the Respondents artfully leave an implication of wrongdoing without explaining that this "transfer" was expressly approved by both State and Federal officials on the basis of formal written requests and was encouraged by Government officials seeking to continue important research without the need to purchase duplicate equipment. (Hutchinson Depo., pp. 148-150). Moreover, in the event of dissolution, the assets of Dr. Hutchinson's private foundation will be distributed to another tax exempt 501(c)(3) entity. (Hutchinson Depo., p. 432).

[6] Also, in presenting the various dollar figures connected with the funding of Dr. Hutchinson's research, the Respondents have inflated the relevant figures by referring to their own Trial Exhibits 82(b) and 83. (A. 306-309; 312). These Exhibits, however, are fraught with errors. For example, the Respondents' list of Dr. Hutchinson's contracts and grants includes one substantial grant which is added into the total twice and another grant for which funding was never actually received. (A. 312). Also, the figures regarding Dr. Hutchinson's grant applications are substantially inflated by the inclusion of applications which were denied, as well as a large number of applications which were submitted by other researchers, with Dr. Hutchinson merely named as an asistant. (A. 306-309). Also, the Exhibit regarding Applications includes many of the same amounts which are included on the Exhibit regarding Funded Grants. (A. 307, 309, 312). Additionally, the Respondents have misrepresented the time period in question by referring to Dr. Hutchinson's "seven years tenure as research director" but then including grants covering an eleven year period from 1967 through 1978. (A. 312). Finally, the figure which the Respondents unabashedly described as representing the total amount of Dr. Hutchinson's applications to "*Federal* agencies" (Br. 11), includes several substantial *private* grants from the American Medical Association, the National Safety Council, the Council for Tobacco Research and the Philip Morris Company. (A. 308-309).

12. On page 11 of their Brief, the Respondents boldly assert that "new grant proposals to each agency generally include no cost information on continuing grants with other agencies or list other pending applications." This allegation is directly contradicted by the actual grant applications included in the record. For example, each of the grant applications filed as Plaintiff's Trial Exhibits 47 through 57 include a section entitled "other support" or "current research support" or "current support," specifically listing the information which the Respondents claim is not included.

THE RESPONDENTS' PRESS RELEASE AND NEWSLETTERS ARE NOT ENTITLED TO ABSOLUTE IMMUNITY UNDER THE SPEECH OR DEBATE CLAUSE

The relevant authority on this issue is set forth at pages 17 through 30 of the Petitioner's principal Brief. As explained therein, the fundamental rule governing

application of the Speech or Debate Clause is that only "legitimate *legislative* activity" is immune. Many other congressional activities may be entirely legitimate, but they are not immune from normal legal constraints unless they are necessary to congressional deliberations. *Doe* v. *McMillan,* 412 US 306 (1973); *Gravel* v. *United States,* 408 US 606 (1972); *United States* v. *Brewster,* 408 US 501 (1972).

Rather than accept the clear import of this Court's interpretation of Speech or Debate immunity, the Respondents' have charged the Court with rendering "conflicting opinions" which contain "unnecessarily broad generalizations" and "engender confusion." (Br. 33). The Petitioner submits that the confusion on this issue is not to be found in this Court's decisions, but rather in the Briefs of the Respondents and their supporting amici.

The Respondents have dedicated a substantial portion of their Brief to an extensive and rather selective review of English precedent prior to the year 1700, as well as some non-judicial writings from early American history addressing the need for legislators to communicate with their constituents. As an initial observation, it may be noted that the lengths to which the Respondents have gone in attempting to avoid the pertinent Supreme Court decisions in this area should provide a valid indicator of the true state of the law. Moreover, the Respondents' historical analysis is incomplete. For example, two English cases decided shortly after the adoption of the United States Constitution held that the Parliamentary privilege did not immunize members from civil liability for libels contained in privately published reproductions of their Parliamentary speeches. *Rex* v. *Creevy,* 1813, 1 Maule & Selwyn 273; *Rex* v. *Lord Abington,* 1795, 1 Esp. N.P. Cases 228. See

generally T. E. May, Treaties on the Law, Privileges, Proceedings and Usage of Parliament 48-66 (16th ed. E. Fellowes & T. G. B. Cocks 1957).

In 1833, Mr. Justice Story, then Dane Professor of Law at Harvard University, published his famous *Commentaries on the Constitution of the United States,* wherein he commented on the legislative privilege as follows:

> "But this privilege is strictly confined to things done in the course of parliamentary proceedings, and does not cover things done beyond the place and limits of duty. (Jefferson's Manual, Sec 3.) Therefor, although a speech delivered in the house of commons is privileged, and the member cannot be questioned respecting it elsewhere; yet, if he publishes his speech, and it contains libellous matter, he is liable to an action and prosecution therefor, as in common cases of libel. (The *King* v. *Creevy,* 1 Maule & Selw. 273.) And the same principles seem applicable to the privilege of debate and speech in congress. No man ought to have a right to defame others under colour of a performance of the duties of his office. And if he does so in the actual discharge of his duties in congress, that furnishes no reason why he should be enabled through the medium of the press to destroy the reputation, and invade the repose of other citizens. It is neither within the scope of his duty, nor in furtherance of public rights, or public policy. Every citizen has as good a right to be protected by the laws from malignant scandal, and false charges, and defamatory imputations, as a member of congress has to utter them in his seat. If it were otherwise, a man's character might be taken away without the possibility of redress, either by the malice, or indiscretion, or overweaning self-conceit of a member of congress." *Story, supra,* Vol. II, Sec 83.

Still another statement of historical precedent was contained in *McGovern* v. *Martz,* 182 F. Supp 343 (DC DC 1960), where the court cited English precedent in support of its ruling that a Congressman's republication of a defamatory statement by circulating reprints from the *Congressional Record* was not entitled to absolute immunity:

> " 'Though a member of Congress is not responsible out of Congress for words spoken there, though libellous upon individuals; yet if he causes his speech to be published, he may be punished as for a libel by action or indictment. This is the English and the just law. [citing *Rex* v. *Abington,* Esp. 226, Peake 310 (1795); *Rex* v. *Creevy,* 3 Eq. N.P. Cases, 228, 1 M. & S. 273 (1813)]. 1 Kent's Commentaries 249, note c (8th Ed. 1854)." 182 F Supp at 347.

Thus, "the English and the just law" is entirely consistent with the recent pronouncements of this Court reaffirming the limited scope of Speech or Debate immunity.

In their historical analysis, the Respondents as well as the amici have referred to a "protest letter" written in 1797 and several other documents stressing the importance of communications between constituents and representatives. (*e.g.,* Br. 23). In this regard, it is important to stress that the Petitioner does not challenge the importance of such communications, but only their immunity from normal legal constraints. As the Respondents themselves have noted, "the legislature has an informing function which is entirely distinct from the business of adopting legislation." (Br. 24). This informing function is not disputed; the issue is whether an individual member of Congress purporting to "inform the public", has absolute immunity to maliciously defame an individual citizen in connection with a widespread multi-media publicity program. This case does not involve limitations on distribution of information, but rather limitations on the scope of absolute immunity.

As the Respondents have admitted, the limited scope of Speech or Debate immunity has not prevented the creation or operation of a "vast statutory network" enabling Congress to communicate with and inform the public and each other. (Br. 27-30). Indeed, the effective operation of this communications network in the context of limited Speech or Debate immunity tends to refute the Respondents' argument that greater immunity is essential to effective communications between Congress and the public. In fact, given the Respondents' premise that a legislator will not communicate with his constituents in the absence of absolute immunity, logic dictates that the constituents might likewise be unwilling to communicate with their legislators in the absence of a similar, absolute immunity for themselves. Certainly the Respondents are not arguing for such an all-encompassing immunity, but it seems to be the logical result of their argument.

This fact is apparent from numerous references in the Briefs filed by the Respondents and the amici. For example, at page 23, the Respondents refer to the need for communications "*between* representatives and their constituents." Similarly, the amici representing the United States Senate quote Senator Metcalf regarding the need for the American people and the Congress to "*exchange* information." (Br. 6). According to the Respondents and amici, this "exchange" of information "between Congress and the public justifies a rad-

ical expansion of the Speech or Debate privilege to include all such communications. The ostensible rationale behind this conclusion is that input from the public is essential to Congressional deliberations. Even assuming that this is true, it must be recognized that the supposedly essential information is that which is transmitted *from* the constituent *to* the legislator. Thus, the side of the communication which the Respondents propose to immunize is, according to their own analysis, less important than the side of the comunication which they cannot possibly fit within the language of the Speech or Debate Clause, since that Clause is expressly limited to "senators and representatives." Consequently, it becomes apparent that the Speech or Debate Clause was not intended to immunize the communications between legislators and the public. Indeed, if the drafters of our Constitution had sought to immunize such communications, it would have been a simple matter to insert a clause providing absolute immunity to every citizen in connection with any communication to or from a member of Congres on a topic of Congressional concern. The plain fact is that our Constitution does not contain such a clause, but rather contains a carefully limited statement of immunity in connection with "Speech or Debate in either House."

In arguing for an extension of absolute immunity to the informing and other non-legislative functions of Congress, the Respondents and amici have apparently lost sight of the exact language of the Constitution. The Speech or Debate Clause is specifically limited to "Speech or Debate *in* either House" and prohibits questioning "in any *other* place." Thus, the Clause is very similar to the English Bill of Rights which provides that "the freedom of speech and debates on proceedings *in* Parliament ought not to be impeached or questioned in any court or place *out* of Parliament." Therefore, to extend the privilege to the extent proposed by the Respondents would be to ignore the literal as well as historical scope of the Clause.

The interpretation proposed by the Respondents would also be inconsistent with the decisions of this Court construing the scope of Speech or Debate immunity. These cases and the principles enunciated therein have been set forth in the Petitioner's principal Brief and need not be repeated here. It should suffice to note that the Respondents' attempts to avoid application of the relevant principles to the instant case are unavailing. With respect to the *Brewster* decision, for instance, the Respondents and the Senate amici contend that the court erred in its statement that newsletters and news releases are "political in nature rather than legislative" and that "it has never been seriously contended that these political maters, however, appropriate have the protection afforded by the Speech or Debate Clause." *United States* v. *Brewster, supra,* at 512. Directly challenging this Court's conclusion, the Respondents and amici have asserted that, in fact, "it had never seriously been contended that such matters as newsletters and news releases were *not* within the protections of Congressional immunity." (Resp. Br. 34; Sen. Br. 18). This contention is completely fallacious. As explained above, Mr. Justice Story, speaking 140 years before the *Brewster* decision, explained that republication of a libellous floor speech "through the medium of the press" would lie outside the scope of the legislative privilege. *Story, supra,* Vol. II, Sec. 863. Also, two early English cases held that the analogous Parliamentary privilege did not shield private republi-

cations from civil liability. *Rex* v. *Creevy, supra; Rex* v. *Lord Abington, supra.*

Long v. *Ansell,* 69 F. 2d 386 (DC CA 1934), affirmed 293 U.S. 76 (1934), is another case which directly contradicts the Respondents' assertion that no one had ever seriously contended that newsletters and press releases were outside the scope of Congressional immunity:

> "A Senator of the United States is here charged with publishing in the District of Columbia, and circulating here and throughout the Country, libelous and defamatory articles, alleged to be a reprint of a speech made on the floor of the Senate. *The charge here is not for slander resulting from a speech made on the floor of the Senate, but for libel in publishing and distributing a copy of that speech, together with a letter calling special attention to the article.*
>
> Defendant pitches his defense upon the exemption from arrest, and not upon his exemption from responsibility for statements made in his speech on the floor of the Senate. *But were that claim advanced, it would be without force,* since the acts charged have only remote connection with the speech. While the published articles were in part reproductions of the speech, the offense consists not in what was said in the Senate, but in the publication and circulating of the libelous documents." 69 F 2d at 389. (Emphasis added).

More recently, the court in *McGovern* v. *Martz, supra,* decided that a Congressman's circulation of reprints from the *Congressional Record* was not entitled to absolute immunity. *McGovern* represents not only a "serious contention" that Speech or Debate immunity is inapplicable to newsletters and press releases but also a direct holding to that effect.

In fact, this principle, which the Respondents and amici assert was never seriously contended, is actually so well established that it was officially recognized in one of Congress' own documents. A booklet entitled, "The Constitutional Privileges from Arrest and of Speech or Debate of Members of Congress, U. S. Constitution, Article I, Sec. 6" (JK 1052 A-73-86 A) (3rd Edition 1972), prepared by the Congressional Research Service, contains the following "serious contention":

> "The *McGovern* case indicates that unofficial circulation by Members of Congress of copies of the *Congressional Record* and of reprints therefrom containing libels, constitutes publication of the libel without protection of their constitutional privileges." (at p. 34).

All of the preceding authorities, including the statements by the Congressional Research Service, directly support this Court's decision in *Brewster* and, correspondingly, contradict the biased and unsupported assertions of the Respondents and amici.

The Respondents' analysis of the decision in *Gravel* v. *United States, supra,* is equally deficient. Because *Gravel* involved a criminal act prohibited by Congress, the Respondents have argued that the scope of Speech or Debate immunity should be determined by the Congressional authorization or prohibition of the act in question. (Br. 39). In other words, acts authorized by Congress would be immune and acts prohibited by Congress would not be immune. If the Respondents' specious analysis were accepted, however, Congress could effectively amend the Constitutional Speech or Debate Clause by simply legislating greater immunity for itself. The absurdity of such a result should be obvious.

The Respondents' strained application of *Doe* v. *McMillan, supra,* to the facts of the instant case similarly fails to withstand scrutiny. According to the Respondents, the decision in *Doe* affords complete immunity to their international publicity release, as well as the subsequent television, radio and press interviews. In reaching this conclusion, the Respondents conveniently overlook the following statement from this Court's opinion in *Doe:*

> "A Member of Congress may not with impunity publish a libel from the Speaker's stand in his home district, and clearly the Speech or Debate Clause would not protect such an act even though the libel was read from an official committee report. The reason is that republishing a libel under such circumstances is not an essential part of the legislative process and is not part of that deliberation process 'by which members participate in committee and House proceedings.'" 412 U.S. at 314-315.

The issue in *Doe,* as in all other Speech or Debate cases, concerned the "legitimate legislative needs of Congress" and the matter was remanded for a determination as to whether the level of public distribution in that case exceeded these "legitimate legislative needs." On remand, the United States Court of Appeals for the District of Columbia Circuit found that the case involved a "limited distribution" of an official government report to those on a standard distribution list with a general interest in all matters before Congress. The limited distribution in *Doe* stands in stark contrast to the distribution in the instant case which the amici representing the House of Representatives frankly characterized as "the widest possible dissemination." (Br. 10). Indeed, the text of the Petitioner's principal Brief details the comprehensive international media distribution undertaken by the Respondents through the use of newspapers, magazines, press interviews, newsletters, radio interviews, telephone conversations and television shows. Clearly, the widespead distribution in this case is readily distinguishable from the limited distribution in *Doe* v. *McMillan.*

Other distinguishing characteristics between *Doe* and the instant case include the fact that, in *Doe,* "no attempt [was made] to call attention to the report or its contents." Also, "distribution ceased as soon as objections to the reports contents were received." Additionally, *Doe* involved an official Congressional report rather than the press release and media statements of an individual member of Congress. In the words of *Watkins* v. *United States,* 354 U.S. 178 (1957), this case presents a classic attempt to "expose for the sake of exposure." If this conduct is sanctioned and immunized by the Court in this case, then the "limited distribution" test will be reduced to a meaningless sham and the scope of Speech or Debate immunity will be virtually unlimited.

The practical effect of recognizing the so-called "informing function" as constituting "legitimate legislative activity" would be to extend absolute immunity to virtually every statement ever made by any member of Congress. This conclusion is even supported by the language contained in the amici's Briefs. On page 11 (fn. 16) of their Brief, the amici representing the Senate present the following definition of "public spending":

> "We refer to funds taxed under the authority of Congress, expenditures authorized by the Congress, and funds appropriated by the Congress . . .

> *every step of that process* from public resources to public use of the funds is our business. How they are spent, who receives the funds and for what and how the funds are used, are all part of the process and thus part of our legislative business."

Under this definition, a member of Congress would arguably enjoy absolute immunity to falsely and maliciously charge an individual citizen (and perhaps his political opponent) with tax fraud. Despite the false and malicious nature of the allegation, the Congressman would be arguably immune because the payment of federal taxes is a matter of legitimate congressional concern.

Even more revealing is the language at page 14 of the Brief submitted by the amici representing the House of Representatives:

> "In a real sense, the appropriations process has *no beginning and no end;* it is a continuous function which spans calendar, fiscal and sessional periods." (Br. 14).

If the appropriations process has no beginning and no end and if all communications related to the appropriations process are entitled to absolute immunity, then logic dictates that Speech or Debate immunity has no beginning and no end. To avoid this absurd result, this Court has repeatedly emphasized that congressional conduct is not immune merely because it is related to the legislative process:

> "We would not think it sound or wise, simply out of an abundance of caution to doubly insure legislative independence, to extend the privilege beyond its intended scope, its literal language and its history, to include all things in any way related to the legislative process. Given such a sweeping reading, we have no doubt that there are few activities in which a legislator engages that he would be unable somehow to 'relate' to the legislative process." *United States* v. *Brewster,* 408 U.S. 501, 516 (1972).

This same rationale should be applied to reject the Respondents' arguments in this case.

THE TORTIOUS PHONE CALLS DURING WHICH RESPONDENT SCHWARTZ DEFAMED DR. HUTCHINSON AND URGED VARIOUS AGENCIES TO TERMINATE HIS FUNDING ARE NOT ENTITLED TO ABSOLUTE SPEECH OR DEBATE IMMUNITY

As explained in an earlier section of this Brief, this issue exceeds the scope of the issues raised in the Petition for Writ of Certiorari and, therefore, in the absence of a cross-petition, should be disregarded. Furthermore, even if the Respondents' arguments regarding the investigative and oversight functions are considered, it should be noted that Respondent Schwartz's information-gathering activities are not at issue in this case. Dr. Hutchinson's Complaint does not challenge the Respondents' requests for information, but rather the Respondents' affirmative statements to various government agencies encouraging them to terminate Dr. Hutchinson's funding. Consequently, the frequent references to "information gathering" and "the investigative function" contained in the Respondents and amici's Briefs are simply irrelevant.

With respect to the phone calls which are actually at issue, the dispositive question must be whether these calls constitute "legitimate legislative activity" necessary to Congressional deliberations. The amici repre-

senting the House of Representatives apparently disagree with this well-established test and assert that:

> "[R]egardless of whether Senator Proxmire's follow-up calls were part of an overall effort to 'legislate' control over the funds in question, they should nevertheless be accorded spech or debate treatment since Congress has historically employed continuous supervision of public expenditures as one way of implementing its Article I, Taxing and Spending Powers." (Br. 22).

This assertion runs directly contrary to all applicable precedent regarding the scope of the Speech or Debate Clause, including the decision in *Doe, Gravel* and *Brewster*. As the amici representing the House have pointed out, there are "myriad means available to oversee the executive branch." (Br. 29). Some of these "means," such as the oversight subcommittees which exist on all standing committees (Br. 25) and the specific legislation govering the expenditure of appropriated funds (Br. 17), constitute legitimate legislative activities and are thus immune. Other methods of oversight, however, such as pressure contacts by individual senatorial aides, are available to members of Congress, but are not entitled to absolute immunity since they are not part of the legislative/deliberative process. As stated by this court in *United States* v. *Johnson,* 383 U.S. 169 (1966):

> "No argument is made, nor do we think it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process." 383 U.S. at 172.

Likewise, in *Gravel* v. *United States,* supra, this Court stated as follows:

> "Members of Congress are constantly in touch with the Executive Branch of the Government and with administrative agencies—they may cajole, and exhort with respect to the administration of all Federal statutes—but such conduct, although generally done, is not protected legislative activity." 92 S. Ct. 2627.

Even the dissenting Justices in the *Gravel* case would agree with the preceding point:

> "I agree with the Court that not every task performed by a Legislator is privileged; intervention before executive departments is one that is not." Dissenting Opinion of Justices Brennan, Douglas and Marshall, 92 S. Ct. 2639.

After reviewing the preceding authorities, there should be little doubt regarding the unprivileged nature of Respondent Schwartz's tortious telephone calls.

DR. HUTCHINSON WAS NOT A PUBLIC OFFICIAL

As explained in the first section of this Reply Brief, the issue of Dr. Hutchinson's alleged status as a "public official," is not properly before this Court. Nevertheless, the following analysis is presented for reference in the event that this Court decides to address the issue.

In *New York Times* v. *Sullivan,* 376 U.S. 254, 283 n. 23 (1964), this Court specifically declined to define the term "public official," but later in *Rosenblatt* v. *Baer,* 383 U.S. 75 (1966), this Court established general standards for determining whether an individual should be so classified:

> "Where a position in government has such apparent *importance* that the public has an independent interest in the qualifications and performance of

> the person who holds it, *beyond the general public interest* in the qualifications and performance of all government employees, both elements we identified in *New York Times* are present and the *New York Times* malice standards apply." 383 U.S. at 86. (Emphasis Added)

Thus, to be properly deemed a public official, an individual must hold a position of such importance that he is the subject of public attention "*beyond* the general public interest." His position must be more significant than that held by the average bureaucrat or management-level civil service employee. A typical government official who catches the public interest only when he is defamed is *not* a "public official" within the meaning of *New York Times* v. *Sullivan:*

> "A conclusion that the *New York Times* malice standards apply could not be reached merely because a statement defamatory of some person in government employ catches the public interest; that conclusion would virtually disregard society's interest in protecting reputation. The employee's position must be one which would invite public scrutiny and discusion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy." *Rosenblatt* v. *Baer, supra,* at 86.

The scope of "public official" status was even more specifically defined in a District Court opinion where the category was held to be:

> ". . . *limited to high-ranking government officials.* It does *not* comprehend the entire government personnel. The host of federal, state, municipal and local government administrators, *scientists,* lawyers, physicians, secretaries, clerks, inspectors of various kinds, policemen, firemen, letter carriers,

> mechanics, laborers, and others, are not affected and are not deprived of their rights under the law of libel. By entering government employment, a person does not lose any of his civil rights. The exception is limited to high-ranking government officers in order to secure the constitutional freedom for every citizen to discuss and criticize his government." *Clark* v. *Pearson,* 248 F. Supp. at 193-4 (Emphasis Added).

It is significant to note that the court in *Clark* specifically stated that government administrators and scientists would not be deprived of their civil rights merely because they are employed by the government. With this in mind, it is appropriate to now consider the specific grounds for the District Court's decision, not considered on appeal, that Dr. Hutchinson was a "public official."

First, the District Court noted that Dr. Hutchinson was "Director of Research" at Kalamazoo State Hospital. Apparently, the court merely assumed that an impressive title alone elevates a government employee to a "high-ranking government position" of such importance that he would attract attention "beyond the general public interest." Considering the fact that government bureaucracies are notorious for attaching impressive-sounding titles to relatively insignificant positions, the court's assumption seems unfounded. Furthermore, as explained below, Dr. Hutchinson's position was far from "high-ranking."

Despite his title as "Director," Dr. Hutchinson did not even possess the power to personally hire or fire his subordinates. (A. 301). Furthermore, he did not and could not participate in any institution-wide administrative meetings. (A. 301). He also lacked any pro-

gram planning authority for directing the policies of the institution. (A. 301). Moreover, at the time of Defendant Proxmire's statements, Dr. Hutchinson had direct control over only 10 or 11 employees, some of whom were merely students working part-time. (A. 301). Consequently, Plaintiff occupied a position of authority inferior to such other hospital employees as the Director of Domestic Services, the Power Plant Supervisor, the Nursing Ward Supervisors and the Maintenance Supervisor. Under these facts, it does not seem probable that Dr. Hutchinson would have attracted any attention, let alone widespread attention "beyond the general public interest."

The second supposed ground for classifying Dr. Hutchinson as a public official was that "he was dealt with as a responsible public official by the federal agencies that funded his research." (Br. 53). This justification erroneously equates trustworthiness with high rank. The test is not whether a person is a government official or even a responsible government official, but whether he is a "high-ranking government official" who attracts attention "beyond the general public interest." *Rosenblatt* v. *Baer, supra; Clark* v. *Pearson, supra.* The mere fact that a scientist or any other government employee is trusted to do his job should not deprive him of the legal right to protect his reputation.

The District Court's third and final reason for finding Dr. Hutchinson to be a public official was that he was president of a tiny non-profit foundation. This rationale is unconvincing for at least two reasons. First, the size of the foundation was negligible. (Hutchinson Depo., pp. 141-144). Second, the foundation was *private,* not governmental. *Rosenblatt* v. *Baer, supra,* refers to "a position in *government*" and *Clark*

v. *Pearson, supra,* specifically limits the public official category to "high-ranking *government* officials." The rule obviously does not embrace the officers of small private foundations.

To the District Court's three reasons, the Respondents' have attempted to add a fourth supposed justification for treating Dr. Hutchinson as a public official. This fourth rationale is based on the level of funding received by the institutions where Dr. Hutchinson worked. The errors in the Respondents' cost figures have already been discussed in footnote 6 of the previous section of this Brief regarding the inaccuracies in the Respondents' Statement of the Case and need not be repeated here. Even if the Respondents' inflated figures were accurate, however, the funding level would not convert Dr. Hutchinson into a public official.

As explained at page 35 of the Petitioner's principal Brief, Dr. Hutchinson did not personally receive any federal research funds. Furthermore, all of the grants involved in the instant case were awarded to the State of Michigan and were administered by persons outside of Dr. Hutchinson's department. The money was dedicated exclusively to purchasing equipment and supplies and to paying the wages of researchers other than Dr. Hutchinson. In fact, during the period in question, the only public funds paid directly to the Petitioner were contained in his salary as a State Civil Service employee. (A. 292-293; 299). Moreover, it is simply false to assert, as the Respondents have asserted, that Dr. Hutchinson exercised complete control over these funds and was "virtually answerable to no one." (Br. 55). Dr. Hutchinson could not embark upon a particular research project without the approval of the superintendent of the Kalamazoo State Hospital and the di-

rector of the Michigan State Department of Mental Health. Further, his grant applications, if approved at these first two levels, would be scrutinized by the relevant agency's peer review committee and assigned a priority rating by other agency officials.

Even if the technical aspects of a particular research proposal were approved at all of the stages mentioned above, Dr. Hutchinson would still lack the authority to control the funding matters. All funding requests were handled by the assistant superintendent of the hospital with advisory copies being sent to the Department of Mental Health. Thereafter, each funding request would also be scrutinized by the agency's program staff and peer review unit.

Similarly, Dr. Hutchinson could not issue purchase orders but merely purchase requests to the hospital's purchasing department. Also, the accounting records regarding the hospital's research were maintained by the hospital's accounting department and not by Dr. Hutchinson. Consequently, it is unfair to cite the grand total of all of the research funds connected with 11 full years of Dr. Hutchinson's research (A. 312), and then portray Dr. Hutchinson as an omnipotent czar possessing the unrestricted authority to spend this money in any manner he chooses. It is much more accurate to view Dr. Hutchinson as a typical government scientist subject to the usual bureaucratic constraints and supervision.

In summary, Dr. Hutchinson was an average government researcher when he was defamed. He was neither a "high-ranking government official" (*Clark, supra*), nor a person who attracted attention "beyond the general public interest in the qualifications and

performance of all government employees." (*Rosenblatt, supra.*) In short, he was not a "public official" and, therefore, the *New York Times* rationale does not require that his legal rights be curtailed.

DR. HUTCHINSON WAS NOT A PUBLIC FIGURE

With respect to the public figure issue, there are two significant areas of agreement between the parties. First, it is agreed that Dr. Hutchinson did not possess "general fame or notoriety" sufficient to elevate him to the level of an "all-purpose public figure." (Respondents' Br. 57). Second, it is agreed that the relevant test for limited issue public figure status is whether an individual has "thrust himself to the forefront of a particular public controversy in order to influence the resolution of the issues involved." *Gertz* v. *Welch,* 418 U.S. 323, 345 (1974).

The areas of disagreement between the parties involve the appropriate interpretation of the above-cited legal standard, as well as certain factual disputes. With respect to the application of the *Gertz* test, the Respondents contend that a person may become a "limited issue public figure" even though he does not assume a role of advocacy in connection with a particular public controversy. (Br. 58-59).[7] The error in the Respondents' position is revealed by simply considering the precise language of the *Gertz* test, indicating that pri-

[7] In footnote 71 on page 59 of their Brief, the Respondents note that Coach Butts in *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967), attained public figure status without attempting to influence a particular public controversy. This analysis, however, is spurious since Coach Butts was not a limited issue public figure, but rather an all purpose public figure who possessed general fame or notoriety as a result of his highly publicized career.

vate citizens do not become limited issue public figures unless they have "*thrust themselves* to the forefront of particular public controversies *in order to influence* the resolution of the issues involved." (Emphasis Added). The plain meaning of this Court's language in *Gertz* is that a limited issue public figure must seek "to influence the resolution" of issues in a "public controversy." In other words, he must maintain or advocate a particular position in that controversy. This conclusion seems inescapable.

Even if conduct short of advocacy is sufficient to satisfy the *Gertz* test, Dr. Hutchinson would still not be a public figure. At the time he was first defamed by the Respondents, Dr. Hutchinson was not involved in any way with any particular public controversy. The only controversy arose *after* the Respondents publicly attacked him. Certainly, the Respondents should not be allowed to use this subsequent controversy to "bootstrap" Dr. Hutchinson into the position of a public figure at the time of his initial defamation. *Gertz* clearly requires that public figure status be limited to those who have "voluntarily exposed themselves to increased risk of injury from defamatory falsehoods concerning them."

Other than the "advocacy" issue discussed above, the only other fundamental differences between the parties with respect to the public figure issue involve disputes over the facts. To a certain extent, these factual disputes provide some indication of the inappropriateness of deciding this case on a Motion for Summary Judgment. Most of the factual disputes result from the Respondents' inattentiveness to the record.

For example, on page 62, the Respondents refer to Dr. Hutchinson's publication of "four books" when the record actually reveals that Dr. Hutchinson never published any books, but merely authored individual chapters in books written by others. (Pl. Exs. 68, 69, 71-73). Moreover, these chapters concerned highly technical esoteric matters which received no significant public attention.

Another factual misstatement is inherent in the asserted distinction between Dr. Hutchinson and "civil servants and others drawing fixed stipends." (Br. 61). In fact, the record indicates that the only public funds received by Dr. Hutchinson during the period in question were contained in his salary as a civil service employee of the State of Michigan. (A. 302). Several other factual errors are included in the Respondents' discussion of the public figure issue, but most of these have already been addressed in the earlier portion of this Brief regarding the Respondents' Statement of the Case.

The principal deficiency in the Respondents' position is that they attempt to elevate Dr. Hutchinson to public figure status on the basis of a public controversy which did not arise until after the distribution of the defamatory press release. If accepted by this Court, this "bootstrap" approach to public figure analysis could significantly increase the number of private individuals subjected to the rigorous "actual malice" standard of *New York Times* v. *Sullivan*. Since these private individuals, like Dr. Hutchinson, have not voluntarily relinquished any part of their interest in the protection of their reputations, the Respondents' argument should be rejected.

THE RECORD PRESENTS A GENUINE ISSUE OF MATERIAL FACT REGARDING THE RESPONDENTS' MALICE

Even if the "actual malice" standard of *New York Times* v. *Sullivan* is applied to the instant case, the record contains sufficient evidence to raise a genuine issue of material fact regarding the Respondents malice.[8] The Respondents', of course, deny the existence of malice and assert that all of their statements were either "opinion or readily apparent use of colloquial expression." (Br. 67). The falsity of this description has already been addressed in the earlier portion of this Reply Brief concerning the "Questions Presented" in the Respondents' Brief. One additional point, however, is worthy of mention. While the Respondents contend that their statements were merely opinion or harmless colloquialisms, rather than factual allegations of misconduct, the American Society of Newspaper Editors and the National Newspaper Association, as amici curiae, have specifically referred to the Respondents' statements as allegations of "misconduct." (Br. 7). Thus, even the amici who support the Respondents'

[8] The malice standard, of course, would not apply unless Dr. Hutchinson were deemed to be a public official or a public figure. Furthermore, although we have assumed that the *New York Times* privilege applies equally to media and non-media defendants, this issue has not yet been decided. As Mr. Chief Justice Burger stated in his concurring opinion in *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 798 (1977), "the Court has not yet squarely resolved whether the Press Clause confers upon the 'institutional press' any freedom from government restraint not enjoyed by all others." Mr. Justice Stewart has expressed the opinion that the First Amendment reference to "freedom of speech *and* of the press" implicitly indicates a special privilege for the press. Stewart, "Or of the Press," 26 *Hastings Law Journal*, 631 (1975); Wade, The Communicative Torts and the First Amendment, 48 *Mississippi Law Journal* 671, 698 (1977).

position have contradicted the Respondents' assertion regarding the absence of factual misstatements.[9]

The specific factual misstatements, examples of ridicule and the evidence of malice are set forth in the Petitioner's principal Brief and thus require no recitation here. The Respondents' treatment of some of these factual misstatements, however, invites attention at this point.

With respect to the charge that Dr. Hutchinson's research projects were "perhaps duplicative," the Respondents do not deny their awareness of the Memorandum finding "no overlap," but they claim that two documents in the record support their charge of duplication. The language in both of these documents speaks for itself and clearly concerns proposed work, rather than funded work. (Defendant's Ex. 90; A. 57).[10]

[9] Of course, some of the Respondents' statements of opinion are also actionable. Section 556 of the Restatement of Torts, 2d, was written after the decision in *Gertz* and accurately describes the current state of the law with regard to defamatory statements of opinion as follows: "All simple expression of opinion based on disclosed or assumed non-defamatory facts is not in itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is. But an expression of opinion that is not based on disclosed or assumed facts and therefore implies that there are undisclosed facts on which the opinion is based, is treated differently. The difference lies in the affect upon the recipient of the communication. In the first case, the communication itself indicates to him that there is no defamatory factual statement. In the second, it does not, and the recipient draws the reasonable conclusion that the derogatory opinion expressed in the comment must have been based on undisclosed defamatory facts, the Defendant is subject to liability." Comment C, § 566, Restatement of Torts, 2d (1977).

[10] The reference in Defendant's Exhibit 90 to Dr. Hutchinson's tendency to "fragment" his work obviously fails to support the Respondents' position for the simple reason that fragmentation

With respect to the charge that Dr. Hutchinson received a personal fortune of $500,000.00 through his research activities, the Respondents have admitted that the attribution of direct funding to Hutchinson was incorrect (Br. 73), but they claim that Dr. Hutchinson was actually making a fortune from his research because he was "among the top percentage of incomes in the country." (Br. 73). In the interest of accuracy, it should be noted that Respondent Schwartz himself has admitted that, at the time of the publicity release, Dr. Hutchinson was earning a salary of $30,000.00 a year. (A. 210).

Notably absent from the section of the Respondents' Brief dealing with the issue of malice is any response to the evidence demonstrating the Respondents' established pattern of malicious defamation of social scientists. Also absent is any response to the Petitioner's contention that the Respondents were aware of the true nature and extent of Dr. Hutchinson's research but knowingly chose to misrepresent and ridicule that research in their various public statements. Similarly, there is no explanation as to why the Respondents proceeded to publish and republish their defamatory statements even after Dr. Hutchinson had specifically advised them that these statements were inaccurate.

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is different than duplication. The reference to "similar studies using other drugs" in the HEW Report (A. 57) also fails to support the Respondents' position since even Senator Proxmire's own press release distinguishes between similar projects and duplicative projects (P. 85).

In view of the considerable evidence demonstrating the Respondents' malice in this case, it was particularly inappropriate to dismiss Dr. Hutchinson's Complaint on a Motion for Summary Judgment. As noted by the Respondents (Br. 67) and the supporting amici (Br. 9), the actual malice standard of *New York Times* requires an assessment of the defendant's subjective awareness of falsehood or reckless disregard of the truth. This subjective issue should not have been decided on a motion for summary judgment:

> "We think that in a libel case, as in other cases, the party against whom a motion for summary judgment, a motion for a directed verdict, or a motion for a judgment notwithstanding the verdict is made is entitled to have the evidence viewed in the light most favorable to him and to all inferences that can properly be drawn in his favor by the trier of fact. We think, too, that in such cases it is not only not the duty of the judge, or of this court of appeal to weigh the credibility of the evidence, or to draw inferences in favor of the moving party (except, of course, when no contrary inference can legitimately be drawn), but that neither the judge nor this court on appeal has the authority to weigh credibility or to choose among legitimate inferences in such cases." *Guam Federation of Teachers, Local 1581, A.F.T.* v. *Ysrael,* 492 F.2d 438, 441 (1974).

When the above-cited principle is applied to the facts of the present case, including the substantial evidence of both the falsity and malice of the Respondents' statements, it becomes readily apparent that summary judgment was wholly inappropriate in this case.

CONCLUSION AND RELIEF SOUGHT

Under the facts of this case, justice requires that Dr. Hutchinson be granted a full trial on the merits. Therefore, the Petitioner hereby respectfully prays that the decision of the United States Court of Appeals for the Seventh Circuit be reversed and the Case remanded for further proceedings in accordance with the opinion of this Court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-680

RONALD R. HUTCHINSON, *Petitioner,*

v.

WILLIAM PROXMIRE and MORTON SCHWARTZ, *Respondents.*

BRIEF OF AMERICAN PSYCHOLOGICAL ASSOCIATION AND AMERICAN ASSOCIATION FOR THE ADVANCEMENT OF SCIENCE AS AMICI CURIAE

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BRIEF OF AMERICAN PSYCHOLOGICAL ASSOCIATION AND AMERICAN ASSOCIATION FOR THE ADVANCEMENT OF SCIENCE AS AMICI CURIAE

CONSENT TO FILING

This Amici Brief is filed, pursuant to Supreme Court Rule 42(2), with the written consent of both parties. Letters to that effect have been filed with the Clerk of this Court.

INTERESTS OF AMICI CURIAE

The American Psychological Association ("APA"), a nonprofit scientific and professional organization founded in 1892, is the major association of psychologists in the United States. The purpose of the APA, as set forth in its Bylaws, is to "advance psychology as a science and profession, and as a means of promoting human welfare by the encouragement of psychology in all branches in the broadest and most liberal manner."

The American Association for the Advancement of Science ("AAAS"), a nonprofit organization founded in 1848, is a national scientific society embracing all of the sciences. The objectives of AAAS are "to further the work of scientists, to facilitate cooperation among them, to foster scientific freedom and responsibility, to improve the effectiveness of science in the promotion of human welfare and to increase public understanding and appreciation of the importance and promise of the methods of science in human progress."

The APA has 50,000 members and includes the vast majority of psychologists holding doctorate degrees from accredited universities in the United States. The AAAS has 130,000 members and includes scientists from each scientific discipline as well as others interested in the advancement of science. APA is an independent affiliate of AAAS. Most of the members of APA and AAAS have a direct or indirect interest in publicly funded research—the specific matter at issue in this case. Moreover, because this case raises important questions which ultimately bear upon the accessibility, nature and conduct of federally funded scientific research, and the dissemination of the results of that research to other scientists and the public, all members of the APA and AAAS, all other scientists and the public could be directly and adversely affected by the decision of the United States Court of Appeals for the Seventh Circuit.

During the last fiscal year, the federal government expended approximately $8.3 billion on basic and applied scientific research. Some of those expenditures were made in the form of grants by various federal agencies to individuals and institutions. Other expenditures were made in the form of government contracts. Approximately 72% of all university-based scientific research in recent years has been funded in this manner.

The psychological research conducted with the aid of these federal funds covered such topics as learning, motivation, perception, developmental processes, social behavior, physiological correlates of behavior, and behavior pathology. Other scientific research covered a broad scope of topics ranging from mathematics, physics and the medical sciences to social, economic and agricultural sciences. Information concerning particular research experiments and projects was typically published in APA and AAAS periodicals, other scholarly journals, trade magazines and other publications.

APA and AAAS have direct interests in the outcome of this case because the decision of the Court of Appeals, if allowed to stand, could subject every one of their members to public harassment, slander and libel without any meaningful remedy if they choose to accept public research funds and publish their experimental findings.

SUPPLEMENTAL STATEMENT OF THE CASE[1]

This matter arises from a decision of the United States Court of Appeals for the Seventh Circuit affirming the District Court's grant of respondents' motion for summary judgment in an action alleging, *inter alia*, libel and slander. The courts below concluded that petitioner was a public figure for defamation purposes and that he had failed to carry the heavy evidentiary burden imposed on such persons.[2]

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[1] The Supplemental Statement is not a complete statement but rather a summary of those facts germane to the arguments propounded by Amici.

[2] *Hutchinson* v. *Proxmire*, 431 F. Supp. 1311 (W.D. Wis. 1977), *aff'd*, 579 F.2d 1027 (7th Cir. 1978). Amici will address only the

Petitioner, Dr. Ronald R. Hutchinson, is a research scientist who has devoted much of his professional career to the study of aggression in humans and animals. He holds several academic degrees including a Ph.D. in experimental psychology from Yale University. Dr. Hutchinson formerly served as a director of research at Kalamazoo State Hospital and as an associate professor of psychology at Western Michigan University.

From 1966 to 1975, Dr. Hutchinson directed various research projects which involved, among other things, experiments concerning latent aggression. To a large extent, that research was funded by grants from the National Aeronautics and Space Administration, the National Institute for Mental Health, the National Institute for Drug Abuse, the National Science Foundation, and the Office of Naval Research. During the course of his research, a local Kalamazoo newspaper carried a few announcements, based on press releases issued by the university, describing Dr. Hutchinson's research activities. And, the findings and conclusions of his research were published in some scholarly scientific journals.

In March 1975, respondent William Proxmire, United States Senator from Wisconsin, instituted a publicity campaign to call attention to what he considered to be wasteful government spending. The Senator's legislative aide, respondent Morton Schwartz, administered the campaign, which consisted of presenting a "Golden Fleece of the Month Award" to persons or organizations in the government that had spent tax

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public figure issue. It expresses no views on other issues presented by this case, *e.g.*, the scope of the absolute immunity provided by the Speech or Debate Clause.

dollars in the most dubious fashion. Based on legwork by Schwartz, Senator Proxmire issued a press release on April 18, 1975, presenting a joint "award" to the National Science Foundation, the National Aeronautics and Space Administration, and the Office of Naval Research for their funding of certain studies conducted by Dr. Hutchinson.

In the press release, Senator Proxmire ridiculed Dr. Hutchinson and his work, labeling the research "transparently worthless" and "nonsense," and charged that Dr. Hutchinson had "made a fortune" through his "grantsmanship." The press release was widely distributed to the news media and attracted nationwide attention. Senator Proxmire repeated one or more of his charges in a speech printed in the Congressional Record, in a newsletter to his constituents, on a Milwaukee radio program, and on a nationally syndicated television show. Some newspapers that had initially reported the "award" published Dr. Hutchinson's reply to the attacks levelled against him and his research.

The District Court granted respondents' motion for summary judgment, partly on a finding that Dr. Hutchinson was a public figure who had not met the heavy burden of proving that the alleged defamation was published with knowledge of its falsity or reckless disregard for the truth. That court, as well as the Court of Appeals, held that Dr. Hutchinson was a public figure because he had applied for and received federal funds to support his research, had published scholarly articles regarding that research, received news coverage of his work in the local press, and his reply to Senator Proxmire's charges was published in some newspapers.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals, if not reversed, will have an adverse and chilling effect upon scholarly scientific research, much of which is supported by public funds. Categorizing scientists as public figures simply because they accept government grants and publish their research findings would expose them to uncompensated injury from defamation—a powerful disincentive to engage in research activities. The holding of the Court of Appeals upsets the careful balance that this Court has fashioned between privacy interests and the First Amendment.

Although an individual can become a public figure for purposes of a particular public controversy by publishing articles and attracting news media attention, a sharp distinction must be drawn between advocacy and purely informational communication. The scientific articles published by Dr. Hutchinson and the limited news coverage of his research were merely informational. They clearly did not constitute advocatory attempts to influence the resolution of a public controversy.

Similarly, his application for and receipt of government grants were not efforts to engage the public's attention in order to influence any controversy. If the receipt of public funds were determinative, it would cast a "public figure" glow upon all persons who receive government monies, ranging from the mother of six on welfare to the farmer whose crops are subsidized. Moreover, it would be anomalous indeed for private researchers to be deemed public figures because of their government-funded work, when government employees performing similar tasks as part of their normal duties would not be considered public officials.

Finally, the Court of Appeals placed excessive emphasis on Dr. Hutchinson's published response to Senator Proxmire's attack, despite recent decisions of this Court making clear that this factor plays a minor role in the determination of public figure status. Those rebuttal opportunities resulted only from the defamatory charges and the *defendant's* ability to obtain widespread news coverage of them. A defamation plaintiff's status surely cannot hinge on his or her attacker's prominence and access to the channels of communication.

ARGUMENT

THE COURTS BELOW NOT ONLY MISAPPLIED THE PUBLIC FIGURE DOCTRINE, BUT ALSO EXPANDED THE CONCEPT WELL BEYOND THE PARAMETERS ESTABLISHED BY THIS COURT

The issue of whether a plaintiff is a public figure controls the applicability of the stringent fault requirement of *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), and, as a practical matter, frequently determines the outcome of a defamation action. The judgment below, if allowed to stand on the grounds that Dr. Hutchinson is a public figure, would represent an extreme departure from the standards previously enunciated by this Court and would have an adverse effect upon scholarly research in this country.

The Court of Appeals devoted less than a page of its opinion to a superficial discussion of Dr. Hutchinson's status as a public figure. The district court's consideration of the issue is more lengthy, but it also lacks reasoned analysis. Neither court focused sharply on the standards established by this Court, and a review of those standards makes plain that the courts below erred in holding that Dr. Hutchinson is a public figure.

Like a public official, a public figure must prove with convincing clarity that the defendant published the alleged defamation with knowledge of its falsity or with reckless disregard for the truth. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 335-36 (1974). Although public figures do not hold public office, they "often play an influential role in ordering society," and "[o]ur citizenry has a legitimate and substantial interest in [their] conduct. . . ." *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 164 (1967) (Warren, C. J., concurring).

Gertz established two major categories of public figures: those who "achieve such pervasive fame or notoriety" so as to become public figures "for all purposes and in all contexts," and, more commonly, those who have "voluntarily inject[ed]" themselves "into a particular public controversy" and thereby become public figures for a "limited range of issues." 418 U.S. at 351. In either case, "such persons assume special prominence in the resolution of public questions." *Id.*[3]

The "pervasive public figure" has achieved general fame or notoriety in the community by occupying positions of "persuasive power and influence," *id.* at 345, by their "pervasive involvement in the affairs of society," *id.* at 352, or, by the "notoriety of their achievements." *Id.* at 342. Indicia of such status include, for example, acknowledgement of prospective jurors that they have heard of the plaintiff and proof that the plaintiff was widely known in the community. *Id.* at 352. In contrast, "limited public figures" are not household names; rather, they have "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Id.* at 345. *See also Curtis Publishing Co.* v. *Butts, supra,* 388 U.S. at 164 (Warren, C.J., concurring). Whether an individual falls within this latter category can be determined only by evaluating "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation," his or her discussion of the issue with the news media, or other efforts to "engage the public's attention in an attempt to influence [the] outcome" of the controversy. 418 U.S. at 352. Of minimal importance is the plaintiff's access to the media for purposes of rebutting the defamatory material. *Id.* at 344. *Time, Inc.* v. *Firestone,* 424 U.S. 448 (1976).

[3] *Gertz* also indicated that there may be a third class of public figures, *i.e.*, those who are "drawn into" a public controversy, 418 U.S. at 351, and thus achieve "involuntary" public figure status "through no purposeful action of [their] own." *Id.* at 345. However, "instances of truly involuntary public figures must be exceedingly rare." *Id.*

A. Dr. Hutchinson Is Not a Public Figure Because He Did Not Voluntarily Thrust Himself Into the Vortex of a Public Controversy in an Attempt To Influence Its Outcome

Because Dr. Hutchinson is not a "household name," he cannot be considered a "pervasive" public figure for all purposes and in all contexts. *Compare Carson* v. *Allied News Co.*, 529 F.2d 206 (7th Cir. 1976) (prominent television personality); *Buckley* v. *Littell*, 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977) (author and political commentator). Accordingly, the relevant inquiry is whether Dr. Hutchinson is a "limited" public figure for purposes of a particular controversy.

As *Time, Inc.* v. *Firestone, supra,* makes clear, the first step in making this determination is defining the scope of the controversy. *See* Note, *Public Figures, Private Figures, and Public Interest,* 30 Stan. L. Rev. 157, 175-78 (1977). The courts below labeled the con-

troversy as "the expenditure of public funds on the precise activities in which [plaintiff] voluntarily participated," 431 F. Supp. at 1327, and "the continued public funding," of plaintiff's research. 579 F.2d at 1035 n.14. Although Senator Proxmire's own statements indicate that this formulation of the controversy is too narrow and that a more accurate description would be "publicly funded research and wasteful government spending,"[4] it is clear that Dr. Hutchinson made no attempt whatsoever to influence the controversy. He made *no* statements prior to the defamation concerning the propriety of continued federal funding of research in general or his project in particular, and he had *no* discussions with the news media concerning this issue. His publications of the findings and conclusions of his experiments were scholarly in nature and did not seek to influence public opinion on the question of public funding of his research. Thus, his "participation in the controversy giving rise to the defamation" was virtually nonexistent.[5]

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[4] The Senator's press release of April 18, 1975, reveals his choice "for the biggest waste of taxpayers' money for the mon th of April" and explained his plan to offer monthly "Golden Fleece" awards culminating in a "Biggest Waste of the Year Award." In his May 1975 newsletter, he again described his scheme to recognize "the organization or person who has most utterly wasted your tax dollars." *See* 579 F.2d at 1036-38.

[5] It cannot be seriously contended that Dr. Hutchinson was an "involuntary" public figure who was drawn into a public controversy. As this Court said in *Gertz*, this type of public figure is "exceedingly rare." 418 U.S. at 345. Moreover, if Dr. Hutchinson was involuntarily caught up in a controversy, the defamatory statements of Senator Proxmire placed him there. To predicate a plaintiff's public figure status on the defendant's action is bootstrapping at its worst. *See* Robertson, *Defamation and the First Amendment: In Praise of Gertz* v. *Robert Welch, Inc.*, 54 Tex. L. Rev. 199, 221 (1976).

There is no doubt that the publishing of books or articles, as well as news coverage thereof, can significantly impact upon a public controversy. In such circumstances the author's efforts to influence its outcome certainly may constitute a "voluntary thrust" into the vortex of a dispute. *See, e.g., Guitar* v. *Westinghouse Electric Corp.*, 396 F. Supp. 1042 (S.D.N.Y. 1975), *aff'd without opinion*, 538 F.2d 309 (2d Cir. 1976) (free-lance writer advocated prevention or restraint of suburban growth); *Exner* v. *American Medical Ass'n*, 12 Wash. App. 215, 529 P.2d 863 (1975) (doctor's book strongly opposed fluoridation). Dr. Hutchinson's publications, however, were scientific, focusing on various aspects of animal and human aggression. Those articles, published in scholarly journals that are not typically read by the public, did not address the question of whether Dr. Hutchinson's research constituted a wise expenditure of public funds or the broader issue of whether publicly funded research amounts to wasteful government spending. Rather, the publications served to inform a professional audience of the nature and extent of Dr. Hutchinson's experiments. Similarly, the news stories that appeared on the back pages of the local newspaper[6] merely reported the basics of Dr. Hutchinson's research, not his views on the controversy at issue here. In short, Dr. Hutchinson's published works and news reports about his research were informational, not advocatory, and the courts below failed to make this crucial distinction. Dr. Hutchinson's publications were contributions to a discrete body of scientific knowledge, not an attempt to "engage the public's attention in an

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[6] The majority of these articles originated in the information department of the University where Dr. Hutchinson was formerly employed. *See* 431 F. Supp. at 1327.

attempt to influence [the] outcome" of the controversy regarding publicly funded research. *Gertz, supra,* 418 U.S. at 352.

The *Gertz* and *Firestone* cases offer useful analogies. In the former, the defamation action stemmed from the killing of a youth by a Chicago policeman, against whom plaintiff brought a civil suit on behalf of the boy's family. Plaintiff, a noted civil rights attorney, was subsequently described in a magazine article as a Communist who was participating in a nationwide, Communist-inspired "war on police," as well as in a "frame-up" of the Chicago policeman. 418 U.S. at 325-26. Despite plaintiff's active involvement in civil liberties matters, his publication of four books and thousands of articles, his prior statements condemning police brutality, and his participation in a sensational case that had attracted extensive media coverage, this Court held that he was not a public figure. He had not discussed the case with the press and, other than representing a private client in a civil suit, had made no attempt to influence the outcome of the controversy. Thus, he had not "thrust himself into the vortex" of the public issue. *Id.* at 352.

In *Firestone,* a weekly newsmagazine erroneously reported that plaintiff's husband had been granted a divorce on grounds of adultery. Plaintiff, a socially prominent woman whose husband was the "scion of one of America's wealthier industrial families," was held to be a private individual for defamation purposes despite having held frequent press conferences during her 17-month divorce trial and having actively sought media attention in regard to her role as a member of

"high society." 424 U.S. at 453-55. Although the press conferences were admittedly voluntary, they were merely informational in nature and thus not deemed to have been held for the purpose of influencing the outcome of the divorce proceedings—the relevant controversy. *Id.* at 454 n.3.

If Mr. Gertz and Mrs. Firestone are not public figures, then neither is Dr. Hutchinson. His involvement in the controversy in no manner approached that of Mr. Gertz, and the limited press coverage of his work was quite insignificant compared to the media attention lavished upon Mrs. Firestone. Accordingly, the courts below plainly erred in concluding that Dr. Hutchinson thrust himself into the vortex of a public controversy to influence its outcome. Although he voluntarily engaged in research and published its results, he played no role in the related but distinct controversy relating to the funding of that activity. That the two are plainly separate is made clear by a simple rhetorical question: would Senator Proxmire have attacked Dr. Hutchinson if his research had been supported by *private* grants?

B. The Criteria Adopted by the Courts Below Impermissibly Broaden the Class of Public Figures Recognized by This Court

There is no doubt that research scientists can and do become public figures, some by active participation in controversial issues, *Pauling* v. *Globe-Democrat Pub. Co.,* 362 F.2d 188 (8th Cir. 1966) (Blackmun, J.), *cert. denied,* 388 U.S. 909 (1967), and others by the mere strength of their ideas. *See Gertz* v. *Robert Welch, Inc., supra,* 418 U.S. at 342. The criteria relied upon

by the courts below, however, are so encompassing that they sweep virtually every researcher who receives government funds into the public figure category, a result plainly inconsistent with *Gertz* and *Firestone*.

The District Court and the Court of Appeals stressed four factors in concluding that Dr. Hutchinson is a public figure: (1) his publication of numerous scholarly articles concerning his research; (2) news stories in the local press regarding his research; (3) his application for and receipt of public funds for his research; and (4) his access to the media to rebut the alleged defamation. 431 F. Supp. at 1327; 579 F.2d at 1034-35. The first two factors, while plainly relevant under *Gertz*, are insignificant here because, as previously noted, neither Dr. Hutchinson's publications nor the local news stories about his research were part of an attempt to influence the resolution of the controversy surrounding the use of government funds for research in general or his particular research activities. Consequently, by relying heavily on the third and fourth factors, the courts below departed significantly from the teachings of this Court, and the decisions thus constitute an unwarranted expansion of the public figure concept.

1. *The mere application for public funds does not thrust an individual into the vortex of the controversy*

The Court of Appeals suggested that Dr. Hutchinson's filing of applications for public funds for his research was a significant factor indicating that he had voluntarily thrust himself into the vortex of the controversy. 579 F.2d at 1035 n.14.[7] But this determination cannot withstand even the most elementary analysis. By filing the applications, Dr. Hutchinson merely invoked the mechanism by which government research funds were to be made available to the public. Like the plaintiff in *Firestone*, he set in motion the public process which had been set up to handle the matter. 424 U.S. at 454.[8] He did not take the crucial step—the "thrusting" step—of seeking to "engage the *public's* attention" in an attempt to influence any decision regarding the propriety of government funding of research in general or his work in particular.

In fact, the application process makes clear that the mere filing of a research proposal is not an attempt to sway public opinion but an effort to communicate one's desire to perform a particular project to those who offer financing opportunities. For example, under the National Science Foundation's guidelines, unsolicited research proposals are subjected to a comprehensive peer review process, with evaluations conducted by agency staff, members of the academic community, and other experts. Projects are funded in the order of their

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[7] Specifically, the Court of Appeals stated that Dr. Hutchinson's efforts to obtain financing for his research "demonstrate his public affirmation of the soundness of the research and the continued funding thereof." *Id.*

[8] While *Firestone* is technically distinguishable to the extent that the public process there, the judicial system, was the only means by which the plaintiff could have legally dissolved her marriage, the principle of the case surely applies here. As noted previously, 72% of all scientific research conducted at universities in recent years was funded by the government. National Science Foundation, *National Patterns of R&D Resources: Funds & Manpower in the United States*, 1953-1977 (NSF 77-310) at 4-5. Thus, as a practical matter, scientists who apply for federal grants are utilizing the only means available for the funding of their university-based research.

merit and to the extent permitted by available funds. *See generally* National Science Foundation, *Grants for Scientific Research* (NSF Pub. No. 78-41).[9] The ultimate decision to fund a project is made by the agency, *not* by the researcher. And, by its selections, the agency serves as an advocate for the expenditure of public monies for research that it considers to be in the public interest.[10]

Moreover, the suggestion that the mere filing of grant applications is a significant factor is squarely at odds with *Gertz*. In *Gertz*, this Court refused to hold that an attorney was a public figure simply because he represented a client in a controversial case. Underlying this refusal was the recognition that such a holding would intimidate lawyers to the point that they might well decline to take controversial cases because of the greater exposure to uncompensated injury from defamation. *See* 418 U.S. at 351. The Court of Appeals' holding that an application for public research funds is a significant factor indicating voluntary involvement in a public controversy serves as a similar disincentive

[9] Under other research programs, the government plays a more active role in defining the scope of a research project. In contract programs, an agency determines that research is needed on a particular topic, defines the nature and scope of the research projects desired, and solicits proposals. The award is made in the form of a procurement contract. *See* National Science Foundation, *Grant Policy Manual* § 202.3 (NSF Pub. No. 77-47). In addition, an agency may decide that research is necessary in a broad area and invite proposals without specifying the particular type of research to be conducted. *Id.* at § 202.2.

[10] Indeed, the National Science Foundation has funded only about 35% of all unsolicited research proposals in the behavioral and neural sciences in recent years. National Science Foundation, *Justification of Estimates of Appropriation, FY 1980: Report to the United States Congress.* If an agency were to fund inappropriate projects, public opinion toward continued expenditures would undoubtedly be affected.

to all research scientists and, if left standing, would chill the desire to conduct much of the scholarly research which contributes immeasurably to the technical and social advancement of our society.[11]

2. *The receipt of public funds does not make one a public figure*

In holding that Dr. Hutchinson is a public figure, the courts below placed considerable emphasis on his receipt of government funds for his research. However, researchers do not become public figures simply by obtaining government grants to finance their work, just as private institutions do not automatically become the "state" for Fourteenth Amendment purposes because they receive government funds. *See Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 725-26 (1961).

It is plain that financial interests of the defamation plaintiff must not be considered in a vacuum, but in the context of the particular public controversy and the plaintiff's role in its resolution. The courts have certainly made the distinction. In *Foster* v. *Laredo Newspapers, Inc.,* 541 S.W.2d 809 (Tex. 1976), *cert. denied,* 429 U.S. 1123 (1977), for example, a private engineer hired by a county government as a consultant for various public works projects was held not to be a public

[11] Scientific research is a multi-staged process. Included in this process is the collection of observations, the forming of hypotheses that link the observations, the testing of the truth or falsehood of the hypotheses and the using of hypotheses in the examination of further observations. Before ultimate conclusions can be reached, therefore, a great deal of trial and error must take place. The Court of Appeals' holding will dissuade research scientists from seeking to undertake publicly funded scientific research for, among other reasons, fear that each trial and error along the way may be the subject of uncompensated defamatory comment.

figure merely because he received county funds for his work. He "remained strictly within his role as an adviser" to the county and did not attempt to influence the outcome of a controversy involving a project on which he had worked. *Id.* at 817. *Accord, Forrest* v. *Lynch,* 347 So.2d 1255 (La. App.), *review denied,* 351 So.2d 168 (La. 1977), *cert. denied,* 435 U.S. 971 (1978) (consulting engineer engaged by architect to prepare plans and specifications for state building project played no role in influencing resolution of the public controversy surrounding the funding of that project).[12]

Unless the *Foster* analysis is applied in the instant case, any person who receives government funds for any purpose is potentially a public figure, regardless of his or her lack of participation in a particular controversy. Thus, welfare recipients, farmers whose crops receive price supports, recipients of student loans, proprietors of small businesses who peddle their wares to government agencies and Medicare recipients would all stand to be public figures, a clearly untenable result. Dr. Hutchinson performed the job he was paid to do, as did the consulting engineer in *Foster,* and the requisite nexus between his receipt of government funds and the influencing of a public controversy was plainly absent.[13]

[12] *Compare Greenbelt Cooperative Pub. Ass'n, Inc.* v. *Bresler,* 398 U.S. 6 (1970) (prominent real estate developer held public figure because of his attempts to secure resolution of controversy in manner favorable to his own financial interests); *Martin Marietta Corp.* v. *Evening Star Newspaper Co.,* 417 F. Supp. 947 (D.D.C. 1976) (defense contractor that entertained military officials for purpose of influencing award of defense contracts held public figure).

[13] Implicit in the decision of the courts below is the erroneous assumption that all grants impact upon the recipient's salary. This, however, is typically not the case. For example, most publicly funded research in psychology takes place in university or industrial settings, and the receipt of a government grant usually does not increase the psychologist's salary, but simply relieves the university or the company of the responsibility for all or part of that salary. Thus, a college professor who earns $18,000 per 9 month academic year does not raise his or her salary by obtaining a $10,000 grant; rather, $10,000 of his or her salary is paid with grant funds and the remaining $8,000 by the university. A grant may include an amount that covers the scientist's summer salary.

Accordingly, the federal funding of Dr. Hutchinson's research affords no basis in either law or policy for holding him to be a public figure.

Moreover, under the approach adopted by the courts below, a private researcher who received a government grant could be forced to shoulder a much heavier burden in a defamation suit than a government employee who performed similar research tasks. The government employee would not, by virtue of his or her research job alone, be a public official under *New York Times Co.* v. *Sullivan, supra,* for the public official designation "applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt* v. *Baer,* 383 U.S. 75, 85 (1966).[14] If a researcher directly employed by the government to perform research in a certain area is not necessarily a public official, it would

[14] The courts have consistently held that, in order to be a public official, a government employee must have some managerial duties or otherwise function as a decisionmaker. *E.g., Silbowitz* v. *Lepper,* 32 A.D.2d 520, 299 N.Y.S.2d 564 (1969) (supervisor of post office branch); *Kapiloff* v. *Dunn,* 27 Md. App. 514, 343 A.2d 251 (1975), *cert. denied,* 426 U.S. 907 (1976) (high school principal). *Compare Chapadeau* v. *Utica Observer-Dispatch, Inc.,* 38 N.Y.2d 196, 341 N.E.2d 569 (1975) (public schoolteacher neither public official nor public figure); *Zeck* v. *Spiro,* 52 Misc.2d 629, 276 N.Y.S.2d 395 (1966) (attorney employed by county sewer district not public official in light of his lack of control over government affairs).

be anomalous to hold that a private individual performing similar research under a government grant is a public figure. Neither has control over the decision to spend public funds for a particular research project.

3. *Access to the news media for rebuttal purposes is at most a minor consideration in determining a public figure*

When first developing the public figure doctrine in *Curtis Publishing Co.* v. *Butts, supra,* this Court distinguished public figures from private individuals on the basis that the former, like public officials, generally enjoy greater access to the channels of communication and thus have a more effective opportunity to counter alleged defamation. 388 U.S. at 155. However, more recently this Court has recognized that the availability of this self-help remedy is in reality only "a minor consideration in determining whether an individual is a public figure." *Time, Inc.* v. *Firestone, supra,* 424 U.S. at 486 (Marshall, J., dissenting); *Gertz* v. *Robert Welch, Inc.,* 418 U.S. at 344 n.9.

Despite the de-emphasis of the rebuttal factor in both *Gertz* and *Firestone,*[15] the courts below stressed Dr. Hutchinson's ability to respond to Senator Proxmire's attack. There are at least two serious flaws with this approach: (1) Dr. Hutchinson was unable to reach the same audience that received the defamatory information; and (2) conditioning public figure status on media conduct *after* publication of the defamatory material creates obvious bootstrapping problems.

[15] The plaintiffs in those cases plainly had access to the news media for rebuttal purposes, for both had been extensively "covered" by the press. Indeed, in *Firestone* the plaintiff had held several press conferences.

This Court alluded to the first difficulty in *Gertz,* noting that "an opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood" because "the truth rarely catches up with a lie." 418 U.S. at 344 n.9.[16] Although Dr. Hutchinson's response was published in various newspapers that had reported Senator Proxmire's "award," Dr. Hutchinson had no opportunity to respond via other media utilized by the Senator: a nationally syndicated television show, a local radio program, the Congressional Record and, of course, the Senator's own newsletter.

The second difficulty is more serious, for the clear import of the opinions below is that any person who is defamed becomes a public figure if his or her denial is mentioned by the press. This Court rejected similar bootstrap analysis in *Gertz* and should do so again here. If the media can gain the protection of the *New York Times* standard simply by publishing a denial, there is obviously no incentive to exercise reasonable care in the original publication of the defamatory charge. Robertson, *Defamation and the First Amendment: In Praise of Gertz* v. *Robert Welch, Inc.,* 54 Tex. L. Rev. 199, 229 (1976).

Moreover, under the approach adopted by the courts below, the classification of an individual as a public figure hinges not on his or her status—as *Gertz* clearly

[16] Courts and commentators have also pointed out this deficiency, describing the "greater access" justification as a makeweight argument. *Reliance Ins. Co.* v. *Barron's,* 442 F. Supp. 1341, 1348 (S.D. N.Y. 1977); Cohen, *A New Niche for the Fault Principle: A Forthcoming Newsworthiness Privilege in Libel Cases?,* 18 U.S.L.A. L. Rev. 371, 376 (1970). *See also* Eaton, *The American Law of Defamation Through Gertz* v. *Robert Welch, Inc. and Beyond: An Analytical Primer,* 61 Va. L. Rev. 1349, 1420-21 (1975).

demands—but rather on the status of his or her attacker. Put another way, the prominence of Senator Proxmire undoubtedly led to some opportunities for Dr. Hutchinson to respond, since the news media generally seeks reactions from those who are criticized, attacked or ridiculed by high government officials. It would indeed be circular to hold that defamed individuals become public figures because their attacker commands ready access to the channels of communication.

Thus, in order to prevent the "access to the media" test from distorting *Gertz,* such access for rebuttal purposes must be measured prior to publication of the defamatory information—the plaintiff "must be seen as he was when the [defamation] was published." *Rosanova* v. *Playboy Enterprises, Inc.,* 580 F.2d 859, 861 (5th Cir. 1978). The courts below plainly failed to do so; they placed undue emphasis on the access element, and, by focusing on rebuttal opportunities created by the defamatory statements themselves, went well beyond the contours established in *Gertz* and *Firestone.*

CONCLUSION

For the foregoing reasons, Amici American Psychological Association and American Association for the Advancement of Science respectfully urge that this Court should reverse the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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FOR ARGUMENT.

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-680

RONALD R. HUTCHINSON, PETITIONER

v.

WILLIAM PROXMIRE and MORTON SCHWARTZ,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE HONORABLE THOMAS P. O'NEILL, Jr., SPEAKER; THE HONORABLE JIM WRIGHT, MAJORITY LEADER AND THE HONORABLE JOHN J. RHODES, MINORITY LEADER, OF THE UNITED STATES HOUSE OF REPRESENTATIVES, AS AMICI CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78–680

RONALD R. HUTCHINSON, PETITIONER

v.

WILLIAM PROXMIRE and MORTON SCHWARTZ, RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE HONORABLE THOMAS P. O'NEILL, Jr., SPEAKER; THE HONORABLE JIM WRIGHT, MAJORITY LEADER AND THE HONORABLE JOHN J. RHODES, MINORITY LEADER, OF THE UNITED STATES HOUSE OF REPRESENTATIVES, AS AMICI CURIAE

The Speaker of the United States House of Representatives, together with the Majority and Minority Leader, hereby appear as *amici curiae*, with the consent of the parties.[1]

INTEREST OF THE AMICI CURIAE

The question presented by this case, whether a Member of Congress may perform the functions of

[1] The letters of consent have been filed with the Clerk's Office.

his office in a vigorous, effective manner free from the apprehension of civil suit as a result, is of great concern to the House of Representatives as an equal component of the Legislative Branch of Government. Despite the fact that it involves a Senator, rather than a Representative, the issues which are presented are equally relevant to House Members and the ruling which emerges will be equally applicable to the activities of House Members.

The elected leadership of the House has a responsibility, as representatives of the body, to assure that the constitutional rights and privileges of the body are upheld, particularly where those rights and privileges are squarely and directly challenged, as they are in this dispute.

The suit attempts to premise a cause of action upon what the *amici* believe are vital and necessary legislative acts, including a speech on the Floor of the Senate, a press release to the Senate Service Department containing the text of the speech; dissemination of the information in the speech to constituents through newsletters and media appearances, and follow-up calls to executive agencies performed in the pursuance of the appropriations and oversight process. Any ruling which would permit these kinds of legislative acts to serve as a basis for suit would have a significant detrimental effect on the functioning of the House and its Members.

SUMMARY OF ARGUMENT

The Speech or Debate Clause of the United States Constitution provides, in pertinent part, that ". . .

Senators and Representatives . . . for any Speech or Debate in either House, . . . shall not be questioned in any other Place," U.S. Const. Art I, § 6. To effectuate the important constitutional purpose underlying the Clause—the maintenance of a vibrant and independent legislative branch—the Clause has not been read so narrowly as to only apply to words spoken in debate. Rather, it has been read to apply ". . . to things generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn* v. *Thompson,* 103 U.S. 168, 204 (1880).

This Court has recently stated that "once it is determined that Members are acting within the 'legitimate legislative sphere' the Speech or Debate Clause is an absolute bar to interference." *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491, 503 (1975), citing *Doe* v. *McMillan,* 412 U.S. 306, 314 (1973).

This absolute bar to interference "when it applies, . . . provides protection against civil as well as criminal actions, and against actions brought by private individuals as well as those initiated by the Executive Branch". *Eastland* v. *United States Servicemen's Fund, supra* at 502–03.

Therefore, the question presented in this case is whether a United States Senator is within the "legitimate legislative sphere" in commenting to other Senators, the public and executive department officials on the utility and worth of certain publicly-funded research projects.

The *amici* contend that investigation and oversight of the legislative appropriations process and public comment related thereto is clearly the proper exercise

of: (1) the constitutional taxing and spending power of the Congress; and (2) the critical informing function of Congress and that therefore a Senator engaging in such activity must not be placed in peril of having to defend his motives and actions in the forum of a civil suit. To allow a civil suit of this nature to be maintained places every Federal legislator in potential jeopardy and will have precisely the intimidating effect sought to be protected against by the Speech or Debate Clause.

The Seventh Circuit Court of Appeals, in finding that the newsletters mailed to constituents by Senator Proxmire were privileged by the Clause, stated that "If the informing function, even though limited, is to be accorded any absolute immunity, it must be in a case such as this." *Hutchinson* v. *Proxmire,* 579 F. 2d 1027, 1033 (7th Cir. 1978). *Amici* submit that the obvious need for protection recognized by the Court of Appeals with respect to the newsletters should apply with equal force to each of the actions for which plaintiff-petitioner seeks to bring the Senator before the judiciary.

ARGUMENT

I. Informing the Public Is a Necessary and Proper Function of the Legislature and as Such It Is Consistent With the Purposes of the Clause for a Legislator To Be Protected in Carrying Out This Function

Dr. Hutchinson is, in part, seeking civil redress for wrongs allegedly committed by Senator Proxmire in the course of disseminating to his constituents and

the public at large his opinion of Dr. Hutchinson's government-funded research. The Senator's activity in presenting his views to the American public were divided by the Court of Appeals into three categories: (1) the press release of a speech delivered by the Senator on the Floor of the Senate; (2) newsletters distributed to the Senator's constituents; and (3) the television, radio and other interviews. *Hutchinson* v. *Proxmire,* 579 F. 2d 1027, 1031 (7th Cir. 1978).

Both the District Court and the Court of Appeals below held Senator Proxmire immune, under the Speech or Debate Clause, from any liability allegedly arising from the issuance and distribution of the press release.

The Court of Appeals also found that the Clause protected otherwise actionable material contained in any newsletter based partially on a finding that "The subject matter and the language of the newsletters make this case factually distinct from *Doe.* 579 F. 2d at 1034, citing *Doe* v. *McMillan,* 412 U.S. 306, 328–29 (Douglas, J., concurring).

However, the Seventh Circuit held that "any defamatory remarks made by Senator Proxmire in television, radio, and other interviews are not protected by absolute immunity." *Id.* The Court of Appeals reasoned that "[s]uch methods of reaching the public are generally not necessary to carry out representative's informing function and are more frequently used for political purposes." *Id.*

Amici present to this Court that all of the above mentioned activities engaged in by Senator Proxmire

were proper exercises of the Congressional "informing" function. The free flow of information, especially information concerning the administration of the government, between a legislator and his constituents lies at the very heart of the process of representative democracy. In realization of the need for an unimpaired flow of information to the citizenry, the Speech or Debate Clause, both in our Constitution and in its earlier English form, is intended to immunize legislators, such as Senator Proxmire, from precisely the type of legal peril to which petitioner-plaintiff seeks to expose him to in the instant case.

The necessity, in a representative form of government, for the legislators to communicate with their constituents was recognized as early as the Fourteenth Century. Commenting on the development of the English Parliament it has been said that:

> "Although taxation, legislation, and policy are the principle themes of parliamentary history in the Fourteenth Century we must not ignore the other valuable functions of parliament . . . representatives were expected to give a report of what had been accomplished at Westminster and were subjected to questions about their personal views on various . . . They regularly delivered reports at the guildhalls and enlightened their audiences on the great political issues of the day. . . . Gone was the age when the sheriffs or itinerant justices [both appointed by the royal administration] linked central to local

> government; this was now done by the knights and burgesses of parliament."

B. Lyon, A Constitutional and Legal History of Medieval England, 557–58 (1960).

The vitality within the American constitutional framework of the "informing" function of the Congress was demonstrated by Thomas Jefferson and James Madison in 1797. A grand jury had condemned the sending, by Congressmen, to constituents of newsletters chastizing the administration's foreign policy. Jefferson and Madison protested this action in a letter addressed to the Virginia House of Delegates. After claiming that to "give the will of the people the influence it ought to have, and [to provide the people with] the information which may enable them to exercise it usefully . . . that representatives . . . communications with their constituents should of right, as of duty also, be free, full, and unawed by any." Jefferson and Madison went on to protest that:

> "for the Judiciary . . . to overawe the free correspondence which exists and ought to exist between them, to dictate what communications may pass between them . . . to put the representative into jeopardy of criminal prosecution, of vexation, expense and punishment before the Judiciary, if his communications, public or private, do not exactly square with their ideas of fact or right, or with their designs of wrong, is to put the legislative department under the feet of the Judiciary, is to leave us, indeed, the shadow, but to take away the substance of representation. . . ."

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8 The Works of Thomas Jefferson, 322–27 (Ford Ed. 1904).

The importance, within the American framework of government, of this legislative informing function was again recognized by Woodrow Wilson who in 1885 noted that:

> "It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discusion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function. The argument is not only that discused and interrogated administration is the only pure and efficient administration, but, more than that, that the only really self-governing people is that people which discusses and interrogates its administration. The talk on the part of Congress which we sometimes justly condemn is the profitless squabble of words over frivolous bills or selfish party issues. It would be hard to conceive of there being too much talk about the practical concerns and processes of government. Such talk it is which, when earnestly and purposefully conducted, clears the public mind and shapes and demands of public mind and shapes and demands of public opinion."

W. Wilson, Congressional Government, 303–304 (1885).

Likewise there has been judicial recognition, by this Court, of the important role played by Congress in informing the public. President Wilson's premise that "The informing function of Congress should be preferred even to its legislative function" was quoted with approval in *Tenney* v. *Brandhove,* 341 U.S. 367, 377 n. 6 (1951). In *Watkins* v. *United States,* 354 U.S. 178, 200 n. 3 (1957) it was noted that "From the earliest times in its history, the Congress has assiduously performed an 'informing function' ".

Justice Black concurred in the result reached by the four Justice plurality opinion in *Barr V. Matteo,* (360 U.S. 564 (1959), which held the Acting Director of the Office of Rent Stabilization immune from civil liability by virtue of a court-fashioned privilege enjoyed by an executive official. In his concurring opinion Justice Black noted that, while Mr. Barr might not have been required to issue press releases such as those at issue in that case, "it is clear that his action was forbidden neither by an Act of Congress nor by any governmental rule duly promulgated and in force". Justice Black went on to state that:

> "The effective functioning of a free government like our depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elec-

> tive or appointed public officials or employees. Such an informed understanding depends, of course, on the freedom people have to applaud or to criticize the way public employees do their jobs, from the least to the most important."

360 U.S. at 577.

Senator Proxmire, in seeking the widest possible dissemination among the American public of his analysis of certain federally funded research projects, appears to be engaging in precisely the type of legislator/public dialogue that has been recognized throughout history as being at the very core of representative government. The court below was correct in holding that the press release and the newsletters were protected by the Speech or Debate Clause. To distinguish the broadcast interviews on the basis of the nature of the medium (television and radio rather than written communication) is to impose an artificial distinction as to the methods of communication a legislator may use to fulfill the informing function. The Court of Appeals below, and petitioner-plaintiff before this Court, seeks to justify the different treatment of the more modern modes of communication as required by this Court's dictum in *United States* v. *Brewster,* 408 U.S. 501 (1972), that constituent newsletters, press releases, and speeches outside of Congress are "political in nature rather than legislative" and are therefore outside the parameters of the protection afforded by the Speech or Debate Clause, 408 U.S. at 512.

If the information being disseminated (a Senator's opinion as to the worth of certain government-funded research) is the type of information which it is proper for a legislator, in the exercise of his informing function, to communicate to his constituents and the public in general then the particular mode of communication used should not be relevant. The Court of Appeals has applied an improper test in basing a judgment on whether or not a particular communication is privileged by the Speech or Debate Clause on the form rather than the substantive content of the communication. *Amici* submit that the application of the Speech or Debate Clause to a particular communication was never intended to be contingent upon a particular medium of communication being employed or being avoided and that instead, it is more consistent with the purposes and history of the Clause, for any decision as to the application of the Clause to be made on the basis of whether or not the substance of the communication is a matter properly publicly addressed by a legislator.

As will be demonstrated in the discussion of the extent of the congressional role in this nation's appropriation process which is contained in the portion of the brief which follows, it is clear that a legislator is properly within his purview in commenting on the expenditure of public funds. *Amici* wholeheartedly agree with the statement of the court below that "If the informing function, even though limited is to be accorded any absolute immunity, it must be in a case such as this." *Hutchinson* v. *Proxmire, supra* at 1033.

II. The Followup Telephone Calls Are an Integral Part of the Valid Exercise of the Congressional Oversight Function and Are Therefore Entitled to Protection Under the Speech or Debate Clause

The Court of Appeals below held that although the process of gathering information on public spending from administrative agencies was protected as "within the legislative sphere", *Hutchinson* v. *Proxmire,* 579 F. 2d at 1032, the phone calls placed by Senator Proxmire's staff to the agencies after award of the Golden Fleece encouraging termination of the research grants could not be accorded Speech or Debate protection. *Id.*[2]

The Court of Appeals reasoned that the contacts with the administrative agencies were "too far removed from the legislative sphere to be absolutely protected", *id.,* and cited for support the following language in *Gravel* v. *United States,* 408 U.S. 606, 625 (1972):

> "Members of Congress are constantly in touch with the Executive Branch of the Government and with administrative agencies—they may cajole, and exhort with respect to administration of a federal statute—but such conduct, though generally done, is not protected legislative activity. *United States* v. *Johnson* decided at least this much."

[2] The court below nevertheless found that the follow-up calls were not actionable because they were protected First Amendment activity.

First, the language relied on by the Seventh Circuit is pure *dicta*; the issue faced by the Court in *Gravel* did not concern executive agency contracts by Members or staff; the precise controversy presented was whether an aide to Senator Gravel could be subpoenaed to appear before a grand jury investigating alleged criminal acts committed in relation to the gathering of classified documents which the Senator placed in the public record at a committee hearing which he chaired and arranged to be published, and whether a protective order entered by the district court proscribing certain categories of questions bearing on legislative matters was appropriate to effect the speech or debate protection, 408 U.S. at 608–610. Neither did the ruling in *Gravel* concern agency contacts by Members of Congress or their staff.

Amici submits that the follow-up telephone calls are an integral part of the legitimate legislative function and are at the core of the proper exercise of the power of Congress to direct the spending of money, and the concomitant and equally vital responsibility to supervise those expenditures. It is further submitted by *amici* that the nature and types of contacts with executive agencies at issue in this case do not come within the category of contacts which have been determined to be outside the "legitimate legislative sphere" by the Gravel *dicta* relied on by the Seventh Circuit or the *Johnson* decision to which it refers and from which it draws support.

As stated by defendant in the court below: "At heart the powers, and hence the business, of Congress

is control over the purse strings of Government." Brief for Defendant-Appellees at 22, *Hutchinson* v. *Proxmire, supra.* The Constitution itself places the responsibility for taxing and spending with the Congress alone:

> "The Congress shall have the Power to lay and collect Taxes, Duties, Imports and Excises . . ."

U.S. Const., art. I, § 8, cl. 1.

> ". . . No Money shall be drawn from the Treasury but in consequence of Appropriations made by law, and a regular statement and Account of the Receipts and Expenditures of all public money shall be published from time to time . . ."

Id. at § 9, cl. 7.

To view the legislative appropriations power delegated to Congress as consisting merely of the passage of laws directing the expenditure of money and the investigation of its uses, but as not encompassing the supervision and control represented by the follow-up telephone calls is an overly narrow and constricted interpretation of an essential power of Congress which is not supported by history, logic, precedent or case law. In a real sense, the appropriations process has no beginning and no end; it is a continuous function which spans calendar, fiscal and sessional periods. The contacts at issue here could as easily be viewed as preparation for the next year's appropriation to the agencies involved as oversight of the expenditures made in the current year.

Accordingly, this Court should reject the mechanistic and rigid approach adopted by the appeals

court and opt instead for a view which recognizes the unique constitutional and historical perspective in which the legislative appropriations power and the supervisory responsibility which it implies are placed so that Congress may continue to exercise these powers in an effective and vigorous manner.

The power to tax and spend, and the responsibility to oversee expenditures, were established early in the struggle between Parliament and the King as powers belonging to the representative branch of government.

> "The commons had become a regular element of Parliament because the king needed their money. It was in the area of taxation that Parliament first secured power over the kings. As early as 1297 we saw the principle enunciated that the consent of the community of the realm was necessary for all taxation save ancient aids and customs. This meant that the king could not levy direct taxes upon his subject without their consent and this came to be given in parliament."

B. Lyon, A Constitutional and Legal History of Medieval England 548 (1960).

However, the power of parliament over the purse strings of government as it developed did not stop at control over taxation.

> ". . . had parliament stopped at this point its victory would have borne no other fruit essential for controlling the king. *While it is very well to control taxation, those who approve it should receive something tangible in return for their money and obtain some guarantee that the money approved will be spent wisely and be*

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used for the welfare of the realm. Fortunately, parliament soon took interest in the purposes for which taxes were used and how they were expended."

Id. at 550 (emphasis added).

In addition, the parliament of the fourteenth century asserted the right to "appropriate the money granted so that it would be expended on specific projects and not commandeered by the king, his councillors, or his favorites for less important and frivolous purposes." *Id.* at 552.

It is this ancient and well established tradition of parliamentary control of and supervision over the raising and spending of money which served as the model for the "power of the purse" which the American constitution lodged in the Congress.

This Court has long recognized, as part of the legislative process, the inherent power to investigate and has described the power as "broad", *Watkins* v. *United States,* 354 U.S. 178, 187 (1957) and as encompassing *"inquiries concerning the administration of existing laws* as well as proposed or possibly needed statutes." *Id.* (emphasis added) No activity would appear to fall as squarely within the category of valid inquiry into the administration of existing laws than the follow-up contacts between Senator Proxmire's staff and the agencies administering the laws under which appropriations were made to them for specific research.

Moreover, these follow-up contacts could well provide information on the intention of the agency to

continue to fund plaintiff's research, a consideration which might weigh heavily in Senator Proxmire's decision either to take actions to reduce money to these agencies or more precisely circumscribe the kind of research permitted by law.[3]

Congress has, from the inception of the republic, exercised its oversight function through inquiries and

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[3] Congress frequently limits, through general administrative provisions, the amount, or manner in which, appropriated money may be spent. For example, a provision was included in an appropriation for the Department of Interior and related agencies for 1979 providing that none of the funds "shall be available to the Smithsonian Research Foundation", Pub. L. No. 95-465, 92 Stat. 1279, 1298 (Oct. 17, 1978); a provision was enacted as part of the appropriation for Department of Transportation and related agencies for 1978 providing that "[n]one of the funds provided in this act shall be available for the planning or execution of programs for any construction or improvements at Flushing Airport in New York City." Pub. L. No. 95-85, § 316, 91 Stat. 402, 417 (Aug. 2, 1977) and a provision in the Department of Defense Appropriation Act of 1978 states that "[n]one of the funds appropriated by this Act shall be available for any research involving uninformed or nonvoluntary human beings as experimental subjects." Pub. L. No. 95-111, § 840, 91 Stat. 886, 906 (Sept. 21, 1977). Scores of these types of prohibitory statutory provisions may be found in other appropriations laws. *See, for example,* Departments of State, Justice and Commerce, the Judiciary, and Related Agencies Appropriation Act, 1979, Pub. L. No. 95-431, §§ 103, 604, 606, 92 Stat. 1021 (Oct. 10, 1978) and Treasury, Postal, and General Government Appropriations Act, 1979, Pub. L. No. 95-429, § 2, 92 Stat. 1001, 1013 (Oct. 10, 1978). Almost all these provisions are a result of congressional oversight of agency administration of the kind performed by Senator Proxmire. Consequently, there would have been nothing to prevent Senator Proxmire from proposing a similar limit on the kinds of research funded by the agencies involved. In such case, the "follow-up" calls would be properly characterized as information gathering, and thereby immunized by the Speech or Debate Clause under *Gravel.*

examinations of the manner in which executive agencies and departments expend money appropriated by the Congress for specific purposes. The congressional power of appropriation implies a right of supervision over the expenditure of public moneys which makes an essential part of the legislative process contacts, both formal and informal, between agencies and Members of Congress responsible for appropriating money.

As early as 1800, Wolcott, Secretary of the Treasury, resigned due to criticism of his administration of that Department, and so informed the House. 10 Ann. Cong. 786–87 (1800). As a result, the House commenced an investigation to examine the state of the Treasury and the expenditures of public money. *Id.* at 796–97. In the course of its exhaustive investigation, the committee carefully scrutinized each and every account maintained in the Treasury, in relation to receipts and expenditures, loans of money, remittances and moneys advanced to individuals on account of current services. *Id.* at 980–986.

The House has always viewed the oversight function respecting the application of public moneys to their stated purposes to be an integral part of the legislative process. In proposing a resolution to commence an inquiry into whether advances had been made by the War Department to the Commander in Chief of the Army, contrary to law; the proponent of the resolution stated:

> "Among the duties—and among the rights, too—of this House, there is perhaps none so important as the control which it constitutionally possesses over the public purse. To what purpose is that control? The mere form of appropriating public money, unless this House rigorously examine into the application of the money thus appropriated; unless the House examine if the amount of appropriation is exceeded by the expenditure; or if it be misapplied, that is, if money appropriated for one object be expended for another; unless we do this, sir, our control over the public purse is a mere name—an empty shadow."

19 Ann. Cong. 1330–31 (1809) (remarks of Rep. Randolph).

Direct contacts with agencies, like those of Senator Proxmire's staff, have always been viewed as essential to the implied supervisory function attendant to the appropriating power of Congress and therefore within the "legitimate legislative sphere". To hold, as did the Court of Appeals below, that such contacts are outside the protection of the Speech or Debate Clause, is to deprive the supervisory power of vitality and ignores the overwhelming evidence that early Congresses viewed it as integral to the legislative appropriations process.

Other examples abound of early Congressional oversight of expenditures of public money by executive agencies.

In 1810, Representative Pearson of North Carolina offered a resolution to inquire into the conduct of Brigadier general Wilkinson based on allegations that he, while in the service of the United States, "corruptly received money from the Government of Spain,

or its agents, or in relation to having . . . been an accomplice . . . in a project against the dominions of the King of Spain . . ." 21 Ann. Cong. 1606–07 (1810). The central focus of the debate on the resolution revolved around the control by Congress of the public purse. In the course of this debate, the fundamental and inherent nexus between the spending and supervisory function were eloquently stated:

> "The true construction of the powers of this House in respect to investigation, other than for the purpose of impeachment, is this: We have, 1st, The power to inquire to inform ourselves and the nation; and 2d, The power to inquire with a view to future legislation. What are we? Legislators, possessing the sovereign power, and drawing from the people the money to support the Government. Being thus constituted, representing the people, and drawing from them the means of keeping up our establishments, have not the people a right to know not only how it is distributed, but to whom? Is it republican doctrine that the people should not know how thair [sic] money is distributed? You may as well say they have not a right to know how it is expended, as to refuse to inform them to whom it is given. I consider it a right of this House, and of the people, to know how their money is expended, and to whom it is given."

Id. at 1743 (remarks of Rep. Sheffey)

The inquiries made by Senator Proxmire in exercising Congressional supervision of the award of contracts by government departments also has its tap-

roots firmly in the history of the early Congresses. In 1820 and 1822 the administration of the Post Office Department was subjected to close scrutiny by the House, which adopted a resolution appointing a committee to investigate the affairs of the Post Office. H.R. Jour., 16th Cong., 2d Sess. 80 (1820). The committee reported to the House on a number of specific areas of inquiry, including "[w]hether the Postmaster General, in his annual reports to Congress of the contracts made by his department, has reported them conformably with law or not." 37 Ann. Cong. 1252 (1821). In relation to this subject, the Committee found that "the dates and duration of these contracts are not reported, which the law, in express terms requires." *Id.* at 1253.

The House has inquired into other areas, including whether money appropriated for the support of the army had been misapplied by General Jackson to raising troops without congressional authorization. 35 Ann. Cong. 717 (1819).[4] Although the Committee found that the disbursements under investigation were 'irregular and unauthorized", H.R. Rep. No. 72, 16th Cong., 1st Sess. 12 (1820), the committee declined to devise specific "legislative remedies against recurrence of these disorders" *id.*, and further concluded:

> "To prescribe the principles of the constitution by legislative enactments, might tend to impair its high and uncontrollable sanctions, and the faithful discharge of the duties of the several

[4] The resolution also provided that the committee could report legislation on the subject.

> committees of the House furnish an adequate remedy against all abuses in the public expenditure. The Committee therefore submit the facts contained in this report, and the documents which establish them, referring them to the discretion of the House."

Id.

This latter example is informative on the congressional perception of the proper exercise of the oversight function. While the expenditure and use of public money is clearly a subject on which "legislation [can] be had", *McGrain* v. *Daugherty,* 273 U.S. 135, 177 (1927), inquiries into executive department administrative decisions need not ultimately result in some form of specific legislation to constitute legitimate legislative activity. Accordingly, regardless of whether Senator Proxmire's follow-up calls were part of an overall effort to "legislate" control over the funds in question, they should nevertheless be accorded speech or debate treatment since Congress has historically employed continuous supervision of public expenditures as one way of implementing its Article I taxing and spending powers.

Congressional efforts to control appropriations have not been limited to the kind of *ad hoc* approach represented by these early examples.

In 1814, a Committee on Public Expenditures was formed to "examine into the state of the several public departments, and particularly into the laws making appropriations of moneys, and to report whether the moneys had been disbursed conformably with such laws." 4 A. Hinds' *Precedents of the House*

of Representatives, § 4315 at 831 (1907). The impetus behind the formation of this committee was a desire "to relieve the Committee on Ways and Means of some of its duties", *id.,* demonstrating that oversight over the expenditure of money by executive departments was considered important and distinct enough to demand the creation of a separate committee for that purpose.

Later, in 1816, the House created several Committees on Expenditures "when, the spirit of inquiry being aroused by 'clamours and suspicions' that had gone forth, Mr. Henry St. George Tucker of Virginia, proposed these committees, which had been found useful in England and in Virginia." *Id.* Significantly, these committees were established for a whole Congress instead of for a single session long before the custom of appointing standing committees for a whole Congress.

In 1946, as part of the Legislative Reorganization Act, provisions of law were adopted "to strengthen congressional surveillance of the execution of the laws by the executive branch." S. Rep. No. 1400, 79th Cong., 2d Sess. 6 (1946). Specifically, each standing committee, in order "[t]o assist the Congress in appraising the administration of the laws and in developing such amendments or related legislation as it deems necessary . . . [shall] exercise continuous watchfulness of the execution by the administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of such committee." Pub.L. No. 79–601, § 136, 60 Stat. 832.

In 1970, the Congress determined that despite the specific responsibility for oversight devolved upon standing committees of the House, most remained primarily concerned with legislative programs.

> "In order to give new emphasis to this responsibility [legislative oversight] which would be redesignated 'legislative review', S. 844 would (1) restate the review functions of standing committees in broader and more comprehensive terms, specifically describing five major categories of continuing inquiry and study; (2) authorize each such committee to employ a review specialist as a member of its professional staff, in addition to those presently authorized, to assist the committee in the performance of its review functions; and (3) require all such committees to submit to their respective Houses, not later than March 31 of each year beginning after January 1, 1970, annual reports relative to review activities for subsequent transmission to the President and appropriate executive and judicial officers."

H.R. Rep. No. 91–202, 91st Cong., 1st Sess. 5 (1969) This proposal was adopted substantially as recommended. See H.R. Rep. No. 91–1215, 91st Cong. 2d Sess. 17 (1970).

Again, in 1974, the House Committee on Committees believing that despite previous legislation there remained "a wide gap between what is required by law and what is actually done", H.R. Rep. No. 93–916, 93d Cong. 2d Sess. 62 (1974) recommended the establishment of oversight subcommittees on all standing committees. The reporting committee premised the

need for these subcommittees on the proliferation of federal programs and agencies to respond to perceived national and international problems. It also stated that the review function was necessary to "eliminate executive waste and mismanagement", and ". . . insure that executive policies reflect national needs and goals", *Id.* The committee further declared that the oversight subcommittees would 'introduce into the Federal governmental process a check and balance whose need was unforeseen in an earlier and less complex day' ". *Id.* at 63 *quoting, Organization of Congress: Hearings before the Joint Committee on the Organization of Congress,* 89th Cong. 1st Sess. 688 (1965) (statement of Rep. Laird).

The House adopted the proposal to establish oversight subcommittees on all standing committees, H.R. Res. 988, 93rd Cong. 2d Sess. § 201 120 Cong. Rec. 34470 (1974) and these provisions are now incorporated in the rules. H.R. Rule X, cl. 2(b)(1), Rules of the House of Representatives, § 692(b) at 397, *reprinted in* H.R. Doc. No. 94–663, 94th Cong. 2d Sess. (1977).

The establishment of special oversight subcommittees for the precise and primary purpose of insuring that executive agencies spend appropriated money as directed by Congress is strong support for finding that congressional-executive agency contacts are within the ambit of the Speech or Debate Clause. Vigorous pursuit of oversight through congressionally created mechanisms is likely to be severely restricted by an interpretation that follow-up calls to agencies are un-

protected by the doctrine of legislative immunity. Although protected by the First Amendment under the appeals court's formulation, *Hutchinson* v. *Proxmire, supra* at 1034, Members of Congress vindicating an important legislative function should not be forced to determine at their risk first whether follow-up calls to an agency constitute protected First Amendment activity, particularly where any protection flowing therefrom is not absolute but dependent upon the absence of "malice" as defined in a vast expanse of case law.

In fact, two Supreme Court cases, decided the same day, have established that executive officers, who communicate to the Congress with respect to matters within their official duties are privileged under a judicially fashioned doctrine of official immunity. *Barr* v. *Matteo,* 360 U.S. 564 (1959) and *Howard* v. *Lyons,* 360 U.S. 593 (1959). In the latter case, the question presented was whether a naval officer, in command of the Boston Naval Shipyard, was privileged with respect to civil liability under Massachusetts law for alleged defamatory matter contained in a memorandum from the officer to his superiors, copies of which were sent to members of the Massachusetts Congressional delegation by his superiors. The Court ruled, based on the decision in *Barr* v. *Matteo, supra,* providing officers of the government a defense to civil damage suits for defamation as a result of performing official acts, that the sending of memoranda from the executive agency to Congress was in the discharge of official duties and therefore privileged. *Howard* v. *Lyons, supra* at 597–

598. It would be ironic indeed if the allegedly libelous statements on official matters flowing from executive branch officials to Members of Congress were privileged under a judicially created doctrine, but that communications flowing from Members of Congress to executive agencies in pursuance of the legislative appropriations oversight function were not privileged in the presence of an "explicit immunity conferred by express provisions of the Constitution on Members of the House and Senate by the Speech or Debate Clause, U.S. Const., Art. I, 6." *United States* v. *Nixon,* 418 U.S. 683, 704 (1974).

This Court has without exception affirmed the power of Congress to investigate into the administration of executive departments, *McGrain* v. *Daugherty, supra* and *Sinclair* v. *United States,* 279 U.S. 263 (1927), and nothing in these cases indicates any basis for limiting the exercise of that power by denying protection to acts, which like the follow-up calls, are integrally related to the performance of the investigative function in the area of congressional appropriations. Nor is *Kilbourn* v. *Thompson,* 103 U.S. 168 (1881), to the contrary. Whatever limits *Kilbourn* imposes, it does so only with respect to inquiries purely into what are deemed the personal affairs of individuals who hold no office in the government, a subject on which no valid legislation could be had and that decision, to the extent it retains its vibrancy, *see Hutcheson* v. *United States,* 369 U.S. 599, 613 n. 16 (1962), places no limitation whatsoever on inquiries into executive agency operations like those involved here.

In the hierarchy of legislative oversight, contact with administrative agencies occupies a position equal to both statutory proscription and hortatory committee report language. This is especially true with respect to the appropriations committees of Congress:

> "Beyond the letter of the appropriation bills it writes, the Committee is expected to pursue its oversight tasks in nonstatutory ways. The Committee holds hearings each year for the purpose of examining agency budget requests and questioning agency officials. Both "on" and "off" the record, ample opportunity exists for the Committee to scrutinize agency behavior and communicate legislative desires to the agency officials involved. Another oversight technique involves the intentions, admonitions, and directions conveyed to the agency by means of Committee reports. Ostensibly written to convey the reasoning behind the Committee's recommendation to the House, the criticisms and suggestions carried in the reports accompanying each bill are expected to influence the subsequent behavior of the agency. Committee reports are not the law, but it is expected that they be regarded almost as seriously. *A third nonstatutory method of oversight involves the informal contact, face-to-face or written, between individual Committee members and the Committee staff on the one hand and the chief executives and budget officers of executive agencies on the other. It is expected that Appropriations Committee influence, like that of all House committees, should be wielded in fairly continuous personal communication with executive agency personnel.*"

R. Fenno, The Power of the Purse: Appropriations Politics in Congress 18–19 (1966) (emphasis added).

The Senate recently issued a manual on oversight techniques for the purpose of acquainting Members and staff with the myriad means available to oversee the executive branch. The manual instructed both Senators and Representatives on methods of individual legislative oversight which might be utilized:

> "Very often, individual Senators or Representatives will conduct their own investigations. Studies may be conducted by a Member's personal staff with hearings possibly held in his home State or district; or the General Accounting Office or some other legislative agency or private research group might be directed to conduct an investigation of a matter for a Senator or Representative. Two examples will illustrate the utility of this device.
>
> A legislator, on his own initiative, can create an *ad hoc* committee to investigate agency responses to certain problems. For example, former Representative David Pryor (Ark.) introduced a resolution in 1971 to create a Select Committee on Aging. After the House Rules Committee, which has jurisdiction over such proposals, did not report the measure, and House leaders were unable to persuade the Rules chairman to send the proposal to the floor, Pryor rented three trailers and with the help of student volunteers held *ad hoc* hearings on the problems of the aged."

Congressional Oversight, Methods and Techniques, prepared for the Subcomm. on Oversight Procedures of the Senate Comm. on Government Operations by

the Cong. Research Service, Library of Congress and the General Accounting Office, 94th Cong., 2d Sess. 6 (Comm. Print 1977).

Clearly, Members do not themselves conceive of the Article I taxing and spending power as limited to voting appropriations on the Floor of the House and no more:

> "A lot of people I have talked to in Congress say this [appropriations budget process] is a waste of time; that Congress really ought to come here for about 3 to 6 months, set the budget limits for each area, and then leave and let the executive branch run this Government as they do anyway and that we really do not have the time or the capability to find out what in the world is going on in these programs, nor should we. We should simply say, Defense Department, you have x to spend, go spend it and we wish you well. . . . I do not think we can run this Government that way. I think we have a responsibility that we have to discharge."

Excerpts From Hearings on Congressional Procedures, Subcomm. on Rules and Organization, House Comm. on Rules, Subcomm. Print No. 96–01, 95th Cong. 2d Sess. 77 (1978) (statement of Rep. Gephardt).

Neither *Gravel* nor *Johnson*, as relied upon by the Seventh Circuit, dictate a holding that the agency contacts in this case are too far removed from the legislative sphere to be protected.

First, in *United States* v. *Johnson,* 383 U.S. 169 (1966), it was held that the Speech or Debate Clause

provided immunity to a Congressman from indictment and trial under a general conspiracy statute for conspiracy to defraud the government where proof of that charge involved inquiry into the motives and preparation of a speech given in the House. "The essence of such a charge in this context is that the Congressman's conduct was improperly motivated, and . . . this is precisely what the Speech or Debate Clause forecloses from executive and judicial inquiry." 383 U.S. at 180. But with regard to the other charges alleging improper intercession with the executive, the Court stated:

> "No argument is made . . . that the Speech or Debate Clause reaches conduct, such as was involved in an attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process."

Id. at 172.

The case presented here simply does not concern alleged improper intercession before executive agencies in violation of criminal statutes devised by Congress itself to protect executive decision making. Rather, it concerns *proper* contact of executive agencies by a Member in the context of the legislative process—the expenditure and use of public money. The follow-up calls can hardly be deemed improper in view of the holdings in *Barr* v. *Matteo, supra* and *Howard* v. *Lyons, supra* that executive officials are immune from suit in contacting Members of Congress about official acts in which they have an interest.

Accordingly, there is nothing, in the facts or the holding in *Johnson* which compels a finding that the

follow-up calls are outside the legitimate legislative sphere. As the above discussion indicates, the oversight role fulfilled through the calls is at the core of the legislative appropriations process and therefore the calls are entitled to the absolute protection provided by the Speech or Debate Clause.

And *Gravel* itself does not foreclose such a holding. As described earlier, *supra* at 13. *Gravel* concerned a protective order to shield the Senator's aide from questioning by a grand jury about the receipt of classified material in preparation for a committee hearing and the publication of that material through non-congressional channels.[5] "Cajoling" and "exhorting" of administrative officials was not at issue in *Gravel;* nor is it at issue here. Senator Proxmire and his staff, in fulfilling their congressional supervisory role were performing an integral and concomitant function under the taxing and spending power, a matter which the Constitution places within their jurisdiction.

For this Court to hold, particularly in the critical appropriations area, that inquiring and voting on spending decisions by executive agencies are protected, while oversight and supervision represented by the follow-up calls are not, will inevitably heighten

[5] The statement drawn from *Gravel* by the Seventh Circuit appears in the context of the Court's holding concerning the alleged arrangement to publish the classified material with a private non-congressional publishing entity. The Court concluded that "private publication by Senator Gravel . . . was in no way essential to the deliberations of the Senate." 408 U.S. at 625. *Amici* contend, as supported by the text of the brief, that Senator Proxmire's follow-up calls were an essential part of legislative deliberations.

the public perception that administrative agencies, created by and purportedly accountable to Congress, are beyond the reach of effective congressional control. Surely, to conclude that Members may "exhort" and "cajole" all they desire on the floor and in committee, where the impact and influence on agencies may be attenuated and sometimes even ignored, but that they are outside the legislative sphere when directly confronting those, through follow-up calls, who are responsible for complying with congressionally mandated intent, makes a mockery of the appropriations process and turns the Congress into a polite debating society where strong words may be used, but never implemented. *Amici* submit that these calls are "an integral part of the deliberative and communicative processes by which Members participate" *Gravel* v. *United States,* 408 U.S. at 625, in the business before them on the appropriation of public money; that the calls are "core" legislative and oversight activity; that they represent a legitimate and recognized method of exercising the Article I taxing and spending power and that for all these reasons are entitled to Speech or Debate protection.

CONCLUSION

In conclusion, the *amici* ask the Court to consider the importance, within the legislative and representative processes by which this nation is governed, of maintaining the ability of an elected legislator to inquire of executive department employees concerning the expenditure of public funds and to communicate

his analysis of such expenditures to the American public. The adverse impact which would occur if a legislator felt intimidated by suits such as the instant case is precisely one of the dangers which the framers of our Constitution sought to prevent by the inclusion of the unique privileges conferred on legislators in the Speech or Debate Clause of our Constitution. *Amici* submit that the framers were successful in that endeavor, and that the Clause, as interpreted by this Court, does bar the instant suit.

Respectfully submitted.

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BRIEF OF THE AMERICAN SOCIETY OF NEWSPAPER EDITORS AND THE NATIONAL NEWSPAPER ASSOCIATION, *AMICI CURIAE* IN SUPPORT OF AFFIRMANCE

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INTRODUCTION AND INTEREST OF THE *AMICI*

The American Society of Newspaper Editors and the National Newspaper Association, whose interests are set forth below with particularity, hereby submit this joint brief as *amici curiae* in support of affirmance of the decision of the United States Court of Appeals for the Seventh Circuit (579 F.2d 1027 (1978)). Letters of consent to the filing of this brief from counsel for all parties have been filed with the Clerk of this Court.

The American Society of Newspaper Editors is a nationwide, professional organization of more than 800 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded over fifty years ago, include the maintenance of "the dignity and rights of the profession" (ASNE Constitution, Preamble) and the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

The National Newspaper Association is a national trade association of 5500 daily and weekly newspapers with members in all fifty states. One of the Association's major purposes is to preserve the constitutional guarantee of freedom of the press for community newspapers.

Amici submit that the protection afforded journalists by this Court's "public figure" doctrine is essential to preventing the diminution of the role of the press as an effective force in informing the public about their society and government. The proliferation of libel actions against newspapers during the last two decades threatens to cast the pall of self-censorship over the entire journalism fraternity, resulting in a decreased flow of information to the public and undermining the goal of "uninhibited, robust, and wide-open" debate on public issues, *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964), repeatedly articulated by this Court. Consequently, *amici* urge this Court to preserve the protections afforded by the First Amendment to discuss the significant people and events of the day without fear of reprisal except for false statements published with subjective actual malice, by affirming the decision of the court below.

ARGUMENT

I. TO AVOID THE PERNICIOUS EFFECTS OF SELF-CENSORSHIP, THE FIRST AMENDMENT REQUIRES PUBLIC FIGURES TO PROVE "ACTUAL MALICE" FOR RECOVERY IN A LIBEL ACTION

Lying at the very core of the values protected by the First Amendment is the notion that debate on significant public issues and government affairs should be "uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964); *see Mills* v. *Alabama*, 384 U.S. 214, 218-19 (1966); *Thornhill* v. *Alabama*, 310 U.S. 88, 101-02 (1940). *See generally* A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (1965). As Justice Brandeis noted, those who won our independence believed that "public discussion is a political duty; and this should be a fundamental principle of American government." *Whitney* v. *California*, 274 U.S. 357, 375 (1927) (concurring opinion). Recognizing that the right to criticize the activities of the government is inseparable from the right to criticize the actions of public officials, this Court in *Sullivan* imposed the stringent standard of "actual malice" on public officials who sought to recover in libel for defamatory false statements directed against them.

This Court subsequently extended the "actual malice" standard to include public figures in *Curtis Publishing Co.* v. *Butts* and its companion case, *Associated Press* v. *Walker*, 388 U.S. 130 (1967). In his concurring opinion, Chief Justice Warren reasoned that given the close and sometimes symbiotic relationship between the government and the private sector, it was highly artificial to distinguish between public officials and "public figures," who often have a pervasive influence on government affairs. He stated further that in light of this inextricable

connection between "public figures" and government, the *New York Times* "actual malice" standard should be extended to include published statements concerning public figures:

> Since the depression in the 1930's and World War II there has been a rapid fusion of economic and political power, a merging of science, industry, and government, and a high degree of interaction between the intellectual, governmental and business worlds.... In many situations, policy determinations which traditionally were channelled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations ....
> ... Our citizenry has a legitimate and substantial interest in the conduct of [public figures], and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of "public officials."

Id. at 163-64 (Warren, C.J., concurring).

These extraordinary protections for false statements are justified because, as is well recognized, First Amendment freedom of expression must have "breathing space" if it is to survive. *E.g., Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974); *New York Times Co.* v. *Sullivan*, 376 U.S. at 271-72; *NAACP* v. *Button*, 371 U.S. 415, 433 (1963). However, despite this extraordinary protection, the volume of libel suits brought and the size of damage awards in libel actions have increased dramatically in the last two decades. 1 A. Hanson, *Libel and Related Torts* vii (1969); Murnaghan, *From Figment to Fiction to Philosophy—The Requirement of Proof of Damages in Libel Actions*, 22 Catholic Univ. L. Rev. 1 (1972). A large damage award constitutes a substantial deterrent to any reporting of the

news. A single such award will significantly affect a large organization; it may result in a smaller newspaper's being put out of business. Indeed, even the costs of defending such a suit are enough to deter many publishers from presenting information on important topics to the public. This omnipresent threat of a large libel action results in ever increasing pressure to engage in self censorship to avoid crushing liability. *New York Times Co.* v. *Sullivan*, 376 U.S. at 279. Such a trend should be of grave concern to all citizens and, as in the past, to this Court in particular. *See Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 339-41; *Dombrowski* v. *Pfister*, 380 U.S. 497, 487 (1965); *NAACP* v. *Button*, 371 U.S. at 432.

II. PETITIONER, WHO VOLUNTARILY INJECTED HIMSELF INTO A MATTER OF PUBLIC CONCERN INVOLVING GOVERNMENTAL AFFAIRS, IS A "PUBLIC FIGURE"

In *Gertz* v. *Robert Welch, Inc.*, this Court analyzed the nature of public figures. It concluded that there were two categories of such persons. The first category encompasses those who have achieved pervasive fame or notoriety; the members of that class are public figures "for all purposes and in all contexts." 418 U.S. 351. The more common type of public figure is an individual who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Id.*

Amici submit that Petitioner has made himself a public figure for two purposes. First, he has voluntarily made a public issue of the utility and effectiveness of his research. Attempting to advance his standing in the scientific community and influence its thought, Petitioner published a number of articles on his research. Thus, he went public. Petitioner should not escape the consequences of his publicity merely because his target group

was less than the whole public. Sophisticated scientific projects, couched in terms not comprehensible to the public at large, can have life and death impact on the public. A layman cannot help but make errors when discussing the desirability and details of scientific research that affects him intimately. If Petitioner, a scientific researcher, may escape the consequences of his publicity because he directed his publication at only a subgroup of the whole public, laymen will be able to discuss the consequences of scientific research only at the risk of suffering extreme damage awards for inevitable misstatements. Thus, to preserve the vitality of the interchange between lay thought and scientific research, this Court should find that Petitioner's publications of the progress of his experiments made him a public figure.

Second, Petitioner is a public figure for purposes of a discussion concerning an important governmental affair—the extent to which government should be funding research projects and which projects deserve government funding. Perhaps Petitioner, in actively soliciting government grants, did not intend to thrust himself to the forefront of this issue. However, he should have been aware of the public's interest in the expenditure of government funds for questionable purposes and the likelihood that he would have to publically justify his requests for tax funds. Petitioner placed himself in a position at which he could become a target of public criticism on an issue of governmental affairs that is pervasively before the public. He should not now be permitted to claim he is a wholly private figure when anticipatable adverse criticism about him and his work does not exceed the bounds of the issue into which he thrust himself.

In the case at bar the defendants, a United States Senator and a member of his staff, made public comments concerning the activities of administrative agencies of the

Executive Branch of government. In so doing they were performing the checking function inherent in the separation of powers concept central to our constitutional system. Defendants similarly performed the vital function of informing the public of alleged misconduct in the allocation of substantial federal funds. The controversy involved in this case is thus the type of political controversy that this Court sought to remove from the scope of the ordinary common law libel action in order to ensure uninhibited debate. *See Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 339-40. The Petitioner clearly inextricably involved himself in a matter of public concern about the activities of its government. Such a relationship is the type envisioned by this Court when it initially extended the actual malice standard to include public figures. *See Curtis Publishing Co.* v. *Butis, supra; cf. Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 61 (1971) (White, J., concurring).

This approach should be contrasted with that taken in *Firestone*. In that case, this Court concluded that the subject matter of the defamation did not constitute a "public controversy" as that term had been used in *Gertz*. 424 U.S. at 454. The dissolution of marriage through divorce implicates privacy concerns, *cf. Boddie* v. *Connecticut*, 401 U.S. 371 (1971), not present in the discussion of people involved in governmental affairs. As *amici* have noted, the discussion of governmental affairs, which is inseparable from the discussion of the personalities involved, has an exalted place among First Amendment values. Such speech is not only a subject for the solicitude of this Court; it is to be encouraged as a fundamental aspect of the American system. *See Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 339-41; *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964); *New York Times Co.* v. *Sullivan*, 376 U.S. at 269-73.

Finally, one salient concern that *Gertz* advanced to reject the position of the plurality in *Rosenbloom* v. *Metromedia, Inc.*, which extended the actual malice standard to all matters of public interest or concern, was the fear of "forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of 'general or public interest'...." 418 U.S. at 346. When, as in the instant case, the controversy in question clearly involves the activities of government, the problem of inconsistent ad hoc analysis is minimized. When the controversy clearly and directly involves the activities of government, the decisional authorities of this Court mandate that individuals who have played a major role in the controversy be deemed public figures.

III. AS THERE WAS COMPLETE ABSENCE OF ANY QUESTION OF MATERIAL FACT ON THE ISSUE OF ACTUAL MALICE, THE COURT BELOW CORRECTLY GRANTED SUMMARY JUDGMENT

The court below was correct in holding that defendants were entitled to summary judgment upon the ground that plaintiff Wolston was a public figure, and that the evidence raised no geniune issue of material fact with respect to the issue of actual malice. In rejecting the Petitioner's position that some agency reports supporting his research put the Respondents on notice of the possible falsehood of their statements, the court stated:

> At best, this [conflict in letters supporting and criticizing Petitioner's work] could be read to show there was a dispute as to the value of the research. This dispute by itself, however, is not sufficient to raise a question of material fact as to whether defendants had knowledge that their statement of opinion regarding the value of the research was actually or probably "false." In addition, it is unchallenged that defendants

> spent many hours investigating and verifying their information.... Defendants even telephoned Dr. Hutchinson before the press release was issued to inform him of its content.... Defendants can also point to their extensive researching of Dr. Hutchinson's applications for federal grants and contracts as support for their opinions regarding plaintiff's "grantsmanship".... Under these circumstances, plaintiff has not presented facts which could demonstrate that defendants acted with a "high degree of awareness of ... probable falsity." *St. Amant* v. *Thompson*, *supra*, 390 U.S. at 730-31, 88 S.Ct. at 1325.

Hutchinson v. *Proxmire*, 579 F.2d 1027, 1035-36 (7th Cir. 1978).

This Court has refined the meaning of the actual malice standard, particularly with regard to what constitutes "reckless disregard." This Court has applied the actual malice standard subjectively, on the basis of the actual state of mind of the particular defendants involved. *St. Amant* v. *Thompson*, 390 U.S. 727 (1968); *Garrison* v. *Louisiana*, 379 U.S. at 64. Evidence tending to show malice in the sense of ill will or hatred will not satisfy either part of the actual malice standard, even though it might suffice to defeat a "fair comment" privilege under state law. *Rosenblatt* v. *Baer*, 383 U.S. 75 (1965). Moreover, actual malice in the form of reckless disregard requires "a high degree of awareness of probable falsity." *Garrison* v. *Louisiana*, 379 U.S, at 74. In addition

> reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the

> conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

St. Amant v. *Thompson*, 390 U.S. at 731.

In developing these stringent standards of proof, this Court has facilitated the disposition of libel suits at the summary judgment stage when plaintiffs are unable to establish a genuine issue of material fact on the issue of actual malice. Recognizing that prolongation of libel suits involving First Amendment speech might result in self-censorship, lower courts often more strictly observe the summary judgment procedures of Rule 56(e) of the Federal Rules of Civil Procedure. *See* Eckhardt & McKey, "*Caldero* v. *Tribune Publishing Co.: Substantive and Remedial Aspects of First Amendment Protection for a Reporter's Confidential Sources.*" 14 Idaho L. Rev. 21, 50 n.193 (1977) (including partial list of more than forty such decisions).

Courts that have adopted the position that First Amendment considerations should facilitate summary judgment have expressed the principle in different ways. They have said, for example, that summary judgment procedures are "an integral part of constitutional protection afforded defendants," *Cerrito* v. *Time, Inc.*, 302 F. Supp. 1071, 1075 (N.D. Cal. 1969), *aff'd per curiam*, 449 F.2d 306 (9th Cir. 1971); are the proper vehicle for disposition of cases under the *New York Times* rule, *LaBruzzo* v. *Associated Press*, 353 F. Supp. 979, 982 (W.D. Mo. 1973); are even more essential than in other cases, *Washington Post Co.* v. *Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966); and, that summary judgment should be "particularly utilized," *Novel* v. *Garrison*, 338 F. Supp. 977, 980 (N.D. Ill. 1971). Thus, according to the Fifth Circuit, "where a publication is protected by the *New York Times* immunity rule, summary judgment, rather than that on the merits, is a proper vehicle for affording constitutional protection in the proper case." *Bon Air Hotel* v. *Time, Inc.*, 426 F.2d 858, 864-65 (5th Cir. 1970); *accord*, *Time, Inc.* v. *McLaney*, 406 F.2d 565, 566 (5th Cir. 1969), *cert. denied*, 395 U.S. 922 (1969).

A considerable number of other courts, however, appear to be granting summary judgment in cases involving New York Times on the basis of traditional principles, unmodified by First Amendment considerations. *See, e.g.*, *Guam Federation of Teachers* v. *Ysrael*, 492 F.2d 438, 441 (9th Cir.), *cert. denied*, 419 U.S. 872 (1974); *Truetler* v. *Meredith Corp.*, 455 F.2d 255, 258 (8th Cir. 1972); *Hensley* v. *Life Magazine*, 336 F. Supp. 50, 53-54 (N.D. Cal. 1971). Because of the danger that libel threats pose of creating self-censorship, *amici* urge this Court to adopt a rule recognizing that a motion for summary judgment is an integral part of the constitutional protection afforded to an individual exercising First Amendment rights to comment on public figures.

CONCLUSION

WHEREFORE, in view of the above, *amici* respectfully request that this Court affirm the judgment of the United States Court of Appeals for the Seventh Circuit, thereby vindicating the freedom under the First Amendment to discuss matters and persons of governmental interest without fear of reprisal, which would inevitably result in self-censorship.

Respectfully submitted,

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FOR ARGUMENT

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No. 78-680

In the Supreme Court of the United States

OCTOBER TERM, 1978

RONALD R. HUTCHINSON, PETITIONER

v.

WILLIAM PROXMIRE AND MORTON SCHWARTZ, RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF AMICI CURIAE OF THE HONORABLE WARREN G. MAGNUSON, PRESIDENT PRO TEMPORE; THE HONORABLE ROBERT C. BYRD, MAJORITY LEADER; THE HONORABLE HOWARD H. BAKER, JR., MINORITY LEADER; THE HONORABLE CLAIBORNE PELL, CHAIRMAN; AND THE HONORABLE MARK O. HATFIELD, RANKING MINORITY MEMBER, COMMITTEE ON RULES AND ADMINISTRATION, OF THE UNITED STATES SENATE ON BEHALF OF THE UNITED STATES SENATE

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The President Pro Tempore, the Majority and Minority Leaders, and the Chairman and Ranking Minority Member, Committee on Rules and Administration of the United States Senate appear here as *amici curiae* on behalf of the United States Senate pursuant to Senate Resolution No. 113[1] and with the

[1] S. Res. 113, 96th Cong. 1st Sess., 125 Cong. Rec. S. 3291 (daily ed. 1979). The Resolution is attached as the Appendix. The letters of consent have been filed with the Clerk's office.

consent of the parties. In addition, the Senate, as an independent house of a co-equal branch of the Government of the United States, asserts its right to appear without consent as an amicus party before this Court pursuant to Supreme Court Rule 42(4).

INTEREST OF THE AMICI CURIAE

This case, against a United States Senator and his aide, involves the fundamental issue of congressional immunity under the Speech or Debate Clause of the U.S. Constitution, Article I, § 6, and the scope of legitimate legislative activity to which absolute immunity under the clause attaches. The issue is fundamental because that clause is the great bulwark guaranteeing an independent legislature and a co-equal branch of government uninhibited or unfettered by incursions from either the Executive or Judicial branches, whether acting in furtherance of their own power or allowing their power to be invoked at the behest of individual or special interest.

The matter is of critical interest because this Court in its examination of the scope of legislative immunity during its 1971 and 1972 terms has made wide pronouncements, beyond the issues of the cases then before it, that: suggest a misunderstanding of how the Congress operates and how its members conduct their business in the representation of their constituents; overlook basic functions of the Congress in investigating and informing necessary to representative government; fail to accord legislative and parliamentary precedent; and which, if unchallenged and uncorrected, may further cause, as they already have, doubts and incursions upon the power of Congress, which erode its independent performance as a body representative of the will of the people.

In short, the Court, at least in its dicta, has cast a "legitimate legislative" role for the Congress and its members narrowed to the formal acts of proposing, debating and enacting legislation, and has tightened the protected perimeter of immunity around this limited activity. Such a pinched view of the functions of Congress is unrealistic and affronts not only Congress' Constitutional powers, but the very basic precepts of democratic government. In Jefferson's words it "is to leave us, indeed with the shadow, but to take away the substance of representation".[2]

The Senate appears here through its own legal representatives rather than by the Solicitor General or by any representative of the Department of Justice because of the inherent conflict with that officer and agency as members of the Executive Branch in a case involving issues of separation of powers. It has in part been through the urging of the Department of Justice that this Court has limited the scope of legitimate legislative activity in *Gravel* v. *United States,* 408 U.S. 606 (1972), and *United States* v. *Brewster,* 408 U.S. 501 (1972), limitations which we now urge be clarified. Moreover, in the context of this case involving investigation and criticism by an individual Senator of wasteful and inefficient spending by three agencies of the Executive Branch, there

[2] *8 Works of Thomas Jefferson* 322 (Ford ed. 1904).

is a direct conflict, since it is the Executive Branch and its agencies, which will benefit by curtailing scrutiny of its activities from a vigilant and uninhibited Congress.

For these reasons, the Senate authorized and engaged counsel to defend Senator Proxmire and his aide from the outset of this action,[3] with instructions to assert the legislative immunity under the Speech or Debate Clause. The Majority Leader of the Senate, Mr. Byrd, has twice reported to the Senate on the process of this litigation through the lower courts.[4] It is with further authorization [5] and grave concern that the Senate now appears in its collective capacity, to assert and urge upon this Court the recognition of a broad but proper scope of legitimate legislative activity, in accordance with the Constitutional mandates of Congressional responsibility, and in harmony with the requirement of separation of powers.

The Senate's appearance as a body in any court is exceedingly rare and it does so now with the greatest

[3] S. Res. 463, 94th Cong., 2d Sess., 122 *Cong. Rec.* S. 9083 (daily ed. 1976). The Resolution states in part as justification: "Whereas the civil action against the Senator from Wisconsin (Mr. Proxmire) seeks damages for actions performed within the scope of a Member of the Senate, duties and responsibilities under the Constitution of the United States . . .".

[4] The matter also came before the Senate in authorization of the Senator and two of his aides to appear in the case for the limited purpose of giving discovery depositions. S. Res. 543, 94th Cong., 2d Sess., 122 *Cong. Rec.* S. 15692 (daily ed. 1976).

[5] Senate Resolution 113, *supra* (Appendix).

reservation, but in recognition of the gravity of the matter before this Court. Once previously the Senate appeared [6] as *amicus curiae* to support the claim of legislative privilege, that time in opposition to the incursions of the Executive Branch. In *Gravel* v. *United States, supra,* the Senate urged the Court to acknowledge the principles: (1) that speech or debate immunity applies to aides acting for members; and (2) that dissemination of information is an essential function of Congress protected by Congressional immunity. As a consequence, the Senate asked that neither the Senator nor his aide be required to appear before the grand jury. The Court only in part accepted this position, recognizing the immunity of aides when acting for members. The Court nonetheless allowed a limited appearance of the aide before the grand jury. Significantly, the grand jury inquiry never proceeded and the aide, Dr. Rodberg, never appeared, making unnecessary further test and strain upon the separation of powers doctrine. Yet another test in a different and less politically charged atmosphere is presented in this case, with an opportunity for the Court to accord and recognize the informing function of Congress, and extend legislative privilege to a member criticizing public spending, and informing the Congress, his constituents, and the public at large as to the merits of that spending. Such open discussion is, as Thomas Jefferson said, a process that must remain "free, full and unawed by any". [7]

[6] That appearance was authorized by S. Res. 280, 92nd Cong., 2d Sess., 118 *Cong. Rec.* 9921 (1972).

[7] Protest in *Cabell's* case, 8 Works of Thomas Jefferson 322 (Ford ed. 1904).

In addition to its appearance here and before the Court in *Gravel*, the Senate has otherwise evidenced its concern over this Court's conception of the role of Congress, and the vital part the informing function plays. Immediately following the disturbing opinions in *Brewster* and *Gravel*, hearings were conducted before the Joint Committee on Congressional Operations on *The Legislative Role of Congress in Gathering and Disclosing Information*, also titled *Constitutional Immunity of Members of Congress.*[8] The presiding officer, Senator Metcalf, in opening the hearings and in comment upon the decisions stated (*Hearings* at 3):

> The Court's definition of legislative activities is a far-reaching institutional challenge.
>
> It threatens the way and the means by which we perform our representative-legislative role.
>
> It threatens the effectiveness, integrity, and independence of our representation of our constituencies.
>
> The Congress must have access to the information resources that are essential to our understanding the need for action and to our formulation of a reasoned response.
>
> And, the Supreme Court, placing the lowest possible value on the free flow of information between Congress and the American people, has announced that you—the American people—and we—the Congress—must act at our peril to exchange information.

[8] *The Legislative Role of Congress in Gathering and Disclosing Information, Parts I and II, Hearings on the Constitutional Immunity of Members of Congress Before the Joint Committee on Congressional Operations*, Mar. 21, 27, 28 and July 19, 1973, 93rd Cong. 1st Sess. (1973) (hereinafter "*Hearings*").

> We cannot receive information from any person and insure the confidentiality of their identity.
>
> We cannot disclose information to the public—in newsletters, speeches, or press releases—without risking the disfavor of the executive or being called to account before the judiciary.
>
> As one commentator concluded, we are insulated from prosecution only when we are isolated from the people.

These hearings included prominent members of Congress, former Justice Arthur Goldberg, professors and constitutional scholars, and representatives from the Department of Justice's Office of Legal Counsel.[9] In addition to testimony, the hearings collected law review articles and opinions on how Congress actually operates. Among its findings the Committee concluded:[10]

> It is the interest of the people—in a legislature that is assured its independence in representing them—that is served by the immunity of legislators for their legislative activities.
>
> The Court has established a narrowed rule of law of legislative immunity in these recent opinions.

[9] Assistant Attorney General Dixon appearing on authority of the Attorney General stressed in his statement that *Gravel* and *Brewster* be read with earlier cases and in light of their holdings, not their dicta. Despite the dicta and recent cases, Dixon urged that the Court does adhere to a broad interpretation of Speech or Debate. Hearings, at 255–256.

[10] S. Rep. No. 93–896, 93rd Cong., 2d Sess. 53 (1974).

> Legislative activities are not limited to the activity of legislating, as the Court has ruled. Legislative activities are, more appropriately, any activities undertaken within the legislative branch in fulfilling the role of the Congress in the constitutionally defined government of coordinate and coequal branches.

Senator Ervin, who appeared before the Committee, later outlined his view of the effects of the Court's decisions:[11]

> As a result of these decisions, the only activities which the Court concedes may be protected from inquiry are the actual proceedings in committee and on the floor of the Congress. The effect of its narrow view of the clause is to cut off the Congress from access to critical information about the doings of the executive branch and to hinder the vital function of publicizing executive action for the benefit of the public's knowledge.
>
> * * * * *
>
> Furthermore, by the removal of legislative immunity from publications, broadcasts, or speeches which seek to inform the public of legislative views, Congress is made not only blind but mute as well. Although words spoken in debate or in hearings are themselves immune, as are the publication of these words in committee prints or the Congressional Record, no republication is protected. The only way the public can learn of information the executive seeks to keep from the people is by reading the actual legislative reports themselves.
>
> * * * * *
>
> In brief summary, the effect of the Court's rulings that acquisition and publication by a legislator are not protected by the "Speech or Debate" clause is a drastic double blow to the concept of separation of powers and to the governmental process. The Court not only cut off the Congress from the executive, but it has cut off the people from the Congress.

[11] Ervin, *The Gravel and Brewster Cases: An Assault on Congressional Independence*, 59 Va. L. Rev. 175, 187–188 (1973).

The fears of the Committee and the effect of the dicta have been felt not only in this case and several others which were premised principally on the dicta, but in a challenge to the franking statute.[12] The pendency of this last action prompted another Congressional inquiry, *Communication With Constituents: The Senator's Duty to Inform the People, Report of the Senate Ad Hoc Committee on Legislative Immunity,* Senate Document No. 95–33, 95th Cong., 1st Sess. (1977). That report traces much of the origin, early history and statements of Congressional framers

[12] *Common Cause* v. *Bailar*, No. 1887–73 (D.D.C.) (pending before a three judge court). That case alone has involved months of effort and occupied staff attention in every Senator's office. See *Dickey* v. *CBS, Inc.*, 387 F.Supp. 1332 (E.D.Pa. 1975), *decided on other grounds*, 441 F.Supp. 1133, *aff'd.* 583 F.2d 1221 (3d Cir. 1978), where assertion of Speech or Debate immunity by a Congressman was rejected without examination, based principally on the *Brewster* dicta. *Id.* at 1334. The decision is discussed in Hettinger, *Representative Government, The Constitution and The Case For The Informing Function of Congress*, 3 Journal of Contemporary Law 278 (1977).

quoted in Senator Proxmire's brief here and quoted in several of the early decisions of this Court. The report affirms the duty of a legislator to communicate, the purpose of the frank to facilitate that practice, the long established history supporting authorization of the frank, dating as early as 1789 or nearly contemporaneous with the Constitution's enactment, and excepts to the dicta raised in the recent decisions while noting the burden that such dicta has imposed in the *Common Cause* action.

In presenting this *amicus* brief the Senate adopts the brief and argument made on behalf of Senator Proxmire and his aide, insofar as it argues legislative immunity under the Speech or Debate Clause. By this limitation we do not exclude or except from the First Amendment argument. Indeed, the Senator should enjoy the fullest exercise of First Amendment rights, as should any citizen in commenting upon public issues, and the Court has on occasion drawn some parallel to corresponding or overlapping privileges of Speech or Debate and First Amendment.[13] But our Constitutional interest here is in vindication of legislative immunity under the Speech or Debate Clause and it is this disposition and resolution of the issues that we urge upon the

[13] Such a parallel is drawn in *United States* v. *Johnson*, 383 U.S. 169, 182, n. 12 (1966). See also *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 492 (1975): "Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally."

Court in this case.[14] To Senator Proxmire's brief we add in this brief our particular concerns.[15]

We attempt no detailed recitation of the facts and whether they constituted actionable libel. For our purposes, and in our view controlling for the application of Speech or Debate immunity, are the following facts: (1) the Senator and his staff investigated an issue involving public spending;[16] (2) the Senator in the manner prescribed by Senate rules appeared on

[14] Of course, we take no position of agreement or disagreement with the actual criticism and conclusions contained in the Senator's speech except to state that the issue of public spending, as contained in that statement, is the proper and appropriate concern of every member of the body and the manner in which the Senator spoke before the body and republished his remarks by press release and newsletter conforms to the Rules of the Senate and should be absolutely protected under the Speech or Debate Clause.

[15] We note that the Court in its present term is confronted with Speech or Debate immunity in two other cases involving House members: *Davis* v. *Passman*, 571 F.2d 793 (5th Cir. 1978) (*en banc*), *cert. granted*, 47 USLW 3301 (Oct. 31, 1978) (No. 78–5072); (argued Feb. 27, 1979); *United States* v. *Helstoski*, 576 F.2d 511 (3d Cir. 1978), *cert. granted*, 47 U.S.L.W. 3408 (Dec. 11. 1978) (No. 78–349). We have not participated in these cases. Our attention here is directed to its application in communications with the public and constituents and communications with government officials in matters relating to public spending.

[16] By "public spending" we refer to funds taxed under the authority of Congress, expenditures authorized by the Congress, and funds appropriated by the Congress. See U.S. Const., Art. I, § 8, Cl. 1, the so-called "Taxing-Spending Power" and Art I, § 9, Cl. 7. Every step of that process from public resources to public use of the funds is our business. How they are spent, who receives the funds and for what, and how the funds are used, are all part of the process and thus part of our legislative business.

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the Senate floor and had his speech included in the Congressional Record; (3) the Senator distributed or caused to be distributed, his speech in the manner prescribed by Senate rules to the press and to members of the public he deemed most interested in the issue of public spending; (4) the Senator continued to explore this issue of public spending by further investigation and contact with government officials, inquiring what further spending was intended; (5) the Senator reported to his constituents and to the public in the customary manner and according to Senate rules by newsletter about this issue of public spending; and (6) the Senator reached a larger public audience by television appearance confining his remarks to what he had said and done on the issue of public spending introduced and pending before the Congress.[17]

[17] The decisions below emphasize Senator Proxmire's role as a member of various subcommittees with appropriation and oversight responsibilities over the five executive agencies which were the targets of his criticism. Although understandably committee assignments add to a Congressman's responsibilities and thus focus and direct his attention to certain areas, our rules do not limit the authority of its members to vote, speak, inquire or initiate action on any matter within the general jurisdiction of the body. Indeed, any such limitation would be Constitutionally infirm in restricting the representation of a particular state to the subject matter of its representatives' committee assignments. The committees of Congress may be limited in their subject jurisdiction, but members possess power and privileges co-extensive with every other member, and may not be so limited. We would not narrow the holding in this case to committee responsibility but apply it to every member of the body. Public spending, of course, is at the very core of Congressional business. Every member may vote upon it, comment about it, and place it in the largest possible public form. That is what Senator Proxmire has done and in this he should be protected.

These facts comprise conduct which we believe the Constitution allows and protects. It involves conduct which our rules seek to facilitate. It involves subject matter central to practically all Congressional business and to which we devote the major portion of our time. It involves informing, investigating and oversight functions of the Congress which are inextricably intertwined with legislative functions, particularly when they deal with public spending. It is conduct that must be protected against question in any other place or our independence as a co-equal branch of government is diminished. More seriously, to fail to protect our means of communication and flow of information to the public and our constituents diminishes democratic representative government.

ARGUMENT

THE COURT'S DICTA IN RECENT CASES NARROWING THE FUNCTION OF CONGRESS SHOULD BE RECONSIDERED AND CLARIFIED

The Court in 1972 and 1973 decided three cases involving Speech or Debate immunity. Each holding is based on narrowly presented facts, but also involves conflicting public interests or competing Constitutional rights. *Brewster* v. *United States*, 408 U.S. 501 (1972), held that a U.S. Senator is not immune from criminal prosecution charging him with bribery, since the taking of a bribe is not part of the legislative process; *Gravel* v. *United States*, 408 U.S. 606 (1972) held that a Senator's aide was not immune from subpoena before a grand jury inquiry into criminal conduct of third parties in the private pub-

lication of secret documents; and *Doe* v. *McMillan*, 412 U.S. 306 (1973) held that while Congressmen, their staff members and consultants were absolutely immune under the Speech or Debate Clause in compiling a report and voting for its publication, the Superintendent of Documents and the Public Printer were not *per se* immune in an invasion of privacy suit for publication of the identification of children in a derrogatory context. (On remand and on additional findings the Superintendent and Public Printer were also held immune for limited publication, *Doe* v. *McMillan*, 566 F. 2d 713 (D.C. Cir. 1977).) However, in addition to these holdings, the Court injected dicta of the most profound implications when describing conduct not at issue and not presented in the records of these cases.

We refer specifically to the following comments:

In *United States* v. *Brewster*, 408 U.S. 501 at 512 (1972):

> It is well known, of course, that Members of the Congress engage in many activities other than the purely legislative activities protected by the Speech and Debate Clause. These include a wide range of legitimate "errands" performed for constituents, the making of appointments with government agencies, assistance in securing government contracts, preparing so-called "news letters" to constituents, news releases, speeches delivered outside the Congress. The range of these related activities has grown over the years. They are performed in part because

> they have come to be expected by constituents and because they are a means of developing continuing support for future elections. Although these are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the Court in prior cases. But it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause.

In *Gravel* v. *United States*, 408 U.S. 606, at 625 (1972):

> But the clause has not been extended beyond the legislative sphere. That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature. Members of Congress are constantly in touch with the Executive Branch of the Government and with administrative agencies—they may cajole, and exhort with respect to the administration of a federal statute—but such conduct, though generally done, is not protected legislative activity.

In *Doe* v. *McMillan*, 412 U.S. 306, at 313 (1973):

> . . . Members of Congress may frequently be in touch with and seek to influence the Executive Branch of Government, but this conduct, 'though generally done, is not protected legislative activity'.

The issues in *Brewster* involved no communications with constituents, neither *Gravel* nor *Doe* concerned legislative contact with agencies of the government.

Accordingly, the Court in *Brewster* observed that in no case had the Supreme Court "ever treated the clause as protecting all conduct relating to the legislative process. In every case thus far before this Court, the Speech or Debate Clause has been limited to an act which was clearly a part of the legislative process—the due functioning of the process". *Id.* at 515–16. A footnote summarized these decisions (*id.* n. 10):

> See *Kilbourn* v. *Thompson,* 103 U.S. 168 (1881) (voting for a resolution); *Tenney* v. *Brandhove,* 341 U.S. 367 (1951) (harassment of witness by state legislator during a legislative hearing; not a Speech or Debate Clause case); *United States* v. *Johnson,* 383 U.S. 169 (1966) (making a speech on House floor); *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967) (subpoenaing records for committee hearing); *Powell* v. *McCormack,* 395 U.S. 486 (1969) voting for a resolution).

But in none of these cases was Speech or Debate immunity withheld from members and none presented factual issues like those described in *Brewster* as outside the scope of the Speech or Debate Clause. In our hearings on Constitutional immunity, Senator Fulbright commented upon this departure from past precedent (*Hearings,* Part 1, at 76):

> Courts, apparently recognizing the need for comity among the three branches of Government, were able to do this by exercising judicial restraint with respect to the speech or debate clause. In affirming a broad scope of legislative acts deemed to be included in the terms of the constitutional provision, the courts necessarily restrained themselves and chose not to enter the legislative arena nor extend their jurisdiction over the actions of Members immediately associated with the legislative process.

To treat the *Brewster, Gravel and Doe* opinions as establishing precedent beyond the bounds then at issue conflicts with the approach estabilshed in *Kilbourn* v. *Thompson,* 103 U.S. 168 (1881). After enunciating the general principle that the clause applied "to things generally done in session of the House by one of its members in relation to the business before it", Justice Miller declined to rule further concerning what was and was not covered (*id.* 204–05): "It is not necessary to decide here that there may not be things done, in the one House or the other, of an extraordinary character, for which the members who take part in the act may be held legally responsible. . . . In this, as in other matters which have been pressed on our attention, we prefer to decide only what is necessary to the case in hand. . . ." [18] In fact these decisions, in defining the scope of privilege, threatened to do in their dicta what the Constitutional Convention rejected—statically delineate the scope of privilege

[18] See Justice Stewart's dissent in *Powell* v. *McCormack,* 395 U.S. 486 at 572–73 (1969) citing *Ashwander* v. *TVA,* 297 U.S. 288, 346–348 (1936) (Brandeis, J. concurring): "The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is applied' ". 297 U.S. at 347. See also Chief Justice Marshall in *Cohen* v. *Commonwealth of Virginia,* 19 U.S. (6 Wheat.) 264 (1821).

without consideration of the evolving legislative process.[19]

We ask that the Court, having made these pronouncements, now reassess them here in a factual setting where investigation and informing have been used in the manner prescribed by the Senate to inform the public about public spending. In light of the facts and the earlier precedents, as well as the comments of the Constitutional framers, we hope that this Court will agree with the court of appeals that "[i]f the informing function, even though limited, is to be accorded any absolute immunity, it must be in a case such as this." 579 F. 2d at 1033.

In *Brewster* the Court—without reference to any authority—suggested removal of immunity from a vast array of legislative actions with the observation that "it has never been seriously contended that these political matters" are protected by the Speech or Debate Clause. No one had "seriously contended" these functions to be protected, since no one before *Brewster* had ever seriously claimed that they fall beyond the protected sphere.[20] The distinction between "legislative" and "political" conduct adds another source of endless confusion to the appropriate understanding of Congress' activity and the necessary bounds for immunity. All legislative activity is political. Indeed, it should be and when it fails to be such, responsiveness to our constituency or to the democratic process is dead. All political activity by Congressmen may not be legislative, but informing is certainly both. As has been repeatedly pointed out, informing constituents about Congressional activity or public issues is tantamount to the continued maintenance of the democratic process. When a representative's legislative activity ceases to be political then he ceases to represent. To deny Congressional immunity simply because the political label may be attached impairs or injures that process.[21] Congress does police its informing activity to guard against solely "political" uses, but it uses every

[19] J. Butzner, *Constitutional Chaff* at 47 (1941). See Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts*, 2 Suff. L. Rev. 1, 184–185 (1968)

[20] Shortly after *Brewster*, much of the same conduct was reviewed in Justice Brennan's dissent in *Gravel* v. *United States*, 408 U.S. 606, 652 (1972). The precise issue of Speech or Debate immunity as applied to newsletters and press releases has not been before this Court and there is little authority on the issue. Legislative immunity was held applicable to press releases and circulation of speeches made on a state senate floor in interpreting a state provision nearly identical to Article I, Section 6. *State* v. *Nix*, 295 P.2d 286 (Okla. 1956). See also *Abercrombe* v. *McClung*, 525 P.2d 594 (Hawaii 1974), where legislative immunity was granted to a state senator for a newspaper interview concerning his floor speech. The state Constitutional immunity was ". . . for any statement made or action taken in the exercise of his legislative functions", Constitution of Hawaii, Article III, Section 8. To the contrary is the dicta in *Long* v. *Ansell*, 69 F. 2d 386 (D.C. Cir. 1934) *affirmed on other grounds*, 293 U.S. 76 (1934). In affirming, Justice Brandeis appropriately ignored the dicta on Speech or Debate which had not been raised as a defense.

[21] As to criticism of the legislative/political distinction in *Brewster*, see Cella, *The Doctrine of Legislative Privilege of Speech or Debate: The New Interpretation as a Threat to Legislative Coequality*, 8 Suff. L. Rev. 1019, 1031, 1041–47 (1974). See also, Ervin, *The Gravel and Brewster Cases: An Assault on Congressional Independence*, 59 Va. L. Rev. 175, 186–187 (1973).

conceivable means at its disposal to promote this necessary legislative function.[22]

The implications of reading *Doe* v. *McMillan,* 412 U.S. 306 (1973) for its full import are also pro-

[22] The manner and means in which Congress facilitates the passage of information and their statutory bases are contained in Respondents' brief (see pp. 24–32). See also Justice Brennan's dissent in *Gravel* v. *United States*, 408 U.S. 606 at 650. The Congress not only provides the means for distribution, but it polices its members against abusing these means for purely political purposes, unrelated to any legislative matters. The Congressional standards for use of the frank are contained in 39 U.S.C. § 3210, *et seq.* The statute also contains limiting rules for the mailing of newsletters and press releases, the means at issue here. For example, newsletters and press releases may contain "discussions of proposed or pending legislation or governmental actions and the positions of the Members of Congress on, and arguments for or against, such matters", 39 U.S.C. 3210(a)(3)(B), but they may not include political campaign material (id. 3210(a)(5)(C)). Enforcement and compliance with the limiting rules on the preparation of mass mail and the frank, pursuant to Senate jurisdiction and rule, are assigned to the Senate Committee on Rules and Administration and the Senate Select Committee Standards and Conduct (now Ethics). In addition, the Senate Service Department screens mass mail submitted to it for distribution to the U.S. Postal Service. See Standing Rules of the U.S. Senate, Rules XXV and XLVIII. Distribution by the Senate Service Department, as in this case, helps to insure that the mailed matter conforms with the statutory standards. In any case of dispute or doubt, the matter is submitted to the Select Committee on Ethics as to its statutory compliance. Joint Committee on Congressional Operations, *Congressional Handbook* at 53 (1975). Similarly, Members of the House must get prior approval of all mass mailings under the frank. Rule XLVI(3), Rules of the House of Representatives (1977). Any misuse of the frank falls within the jurisdiction of the House Commission on Congressional Mailing Standards and the Senate Select Committee on Ethics. See 2 U.S.C. §§ 501, 502.

foundly disturbing. While the Court protected all of the conduct of legislators in their collection, reporting and distribution of materials, it withheld a *per se* application of immunity to the Superintendent of Documents and the Public Printer, who were implementing the informing function dictated by Congress. On remand the district court and the court of appeals examined the facts of distribution and found that the distribution was "'routine and ordinary' and quite limited in scope" and therefore entitled to immunity.

The holding in *Doe* v. *McMillan,* 412 U.S. 306 (1973) adds to our concern of whether the Court fully appreciates the breadth of our legislative function. By withholding immunity for distribution of official material produced by Congress and intended for public consumption, the Court tends to isolate us from the public. Such isolation denies to legislators a necessary contact with the public not only in order to inform the electorate but through its response to fulfill its role in the legislative process. In the words of Justice Rehnquist, the decision comes close to imposing the "mischievous possibilit[ies] of censorship" by one branch of the Government upon the other, *id.* at 344.

In the interest of protecting privacy, the Court withheld an automatic or *per se* application of Speech or Debate immunity for the distribution of a Congressional report absent a showing that the distribution was within "the apparent needs of the *'due* functioning of the [legislative] process' ". *Id.* at 317.

The majority opinion suggested that merely a limited internal distribution was necessary (*ibid.*):

> To the extent that the Committee report is printed and internally distributed to Members of Congress under the protection of the Speech or Debate Clause, the work of Congress is in no way inhibited. Moreover, the internal distribution is "public" in the sense that materials internally circulated, unless sheltered by specific congressional order, are available for inspection by the press and by the public.

What is the distinction for purposes of immunity between the press or public digging out information deemed public and the Congress making it broadly available? The concept of limited distribution within "the halls of Congress" is antithetical to democratic government and runs counter not only to our Constitutional mandate to make open and public what we do, but the exercise of that mandate in making the broadest possible circulation of Congressional material so that all will know the actions of their government.

The purpose of public distribution and the public role in legislation is better understood and described in the opinion of Justice Blackmun (*id.* at 332):

> Each step in the legislative report process, from the gathering of information in the course of an officially authorized investigation to and including the official printing and official distribution of that information in the formal report, is legitimate legislative activity and is designed to fulfill a particular objective. More often than not, when a congressional committee prepares a

> report, it does so not only with the object of advising fellow Members of Congress as to the subject matter, but with the further objects (1) of advising the public of proposed legislative action, (2) of informing the public of the presence of problems and issues, (3) of receiving from the public, in return, constructive comments and suggestions, and (4) of enabling the public to evaluate the performance of their elected representatives in the Congress.

Informing in this sense is truly legislative. It makes, to the extent possible, members of the public genuine participants in the legislative process. Justice Blackmun's description corresponds very closely to what Senator Proxmire has described as his purpose in informing by press release and newsletter of the actions he has taken on the floor of the Senate. (A. 139–141.)

The impact of *Doe* was ominously but accurately forecast by Justice Blackmun when he speculated as to its implications upon the distribution of the Congressional Record (*id.* 336, n. 8):

> An interesting dilemma is presented by the possibility of an injunction against distribution where "otherwise actionable" material is printed in the Congressional Record. The Court recognizes the existence of this problem and reserves its resolution for another day. *Ante*, at 325 n. 16. The Congressional Record, however, receives wide public distribution on a regular basis and it is not an uncommon occurrence for all or part of a committee report or other document to be read into the Record by a Member of Congress. In light of the

> Court's holding in this case, it is conceivable that, in lieu of separate publication as a committee document, a committee report containing possibly actionable material hereafter will be printed in the Record in order to effectuate public distribution. It appears to me almost beyond question that an injunction against the distribution of the Congressional Record is clearly precluded by the Speech or Debate Clause and by the Constitution's Art. I, § 5, cl. 3, providing that "[e]ach House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy."

Subsequent rather than prior restraints are involved in this case, but the Court should remove *any* restraints which impinge upon the authorized distribution of Congressional material. To do otherwise is to alter the form and substance of our government.

On remand in *Doe*, the district court and the court of appeals readily seized upon the escape route offered by the majority, in finding that routine distribution of the committee report to libraries, embassies, and the public served a legitimate legislative need and was therefore within the privilege, *Doe* v. *McMillan*, 566 F. 2d 713 (D.C. Cir. 1977), *cert. den.*, 435 U.S. 969 (1978). In doing so, the appeals court threaded through the *Doe* majority, concurring and dissenting opinions and found the common ground of recognizing "that the Congress possessed some 'informing function' . . . [and] that informing the public concerning matters before Congress was a 'legitimate function' ". (*Id.* at 717.)

As to the limited distribution outside Congress to those on standard distribution lists with a general interest in all matters before Congress, the appeals court found this distribution also necessary to the legislative process (*id.* at 718):

> Distribution of such reports informs the public and permits them to comment on pending matters. It permits individuals and companies who consider their interests to be affected to take steps to exercise their constitutional right of petition. The right to petition is one of the freedoms protected by the First Amendment of the Bill of Rights. . . . The right to petition would be meaningless if proceedings in Congress were not publicly available. . . . Restricting distribution of committee hearings and reports to Members of Congress and the federal agencies would be unthinkable. . . . This is merely one illustration of the need to make such reports generally available to the public.

While cautiously presenting the findings ordered on remand, the court of appeals has in effect broadly affirmed the necessity of public distribution and the informing function as a necessary link in the legislative process. To Speech or Debate protection it added the right of petition as a basis for the open exchange of information. We urge that this Court apply Speech or Debate protection to the fullest degree in protecting the communicating of legislative business to the public as a necessary foundation of our government and as insured by our Constitution.

In its most recent review of Speech or Debate immunity in *Eastland* v. *United States Servicemen's*

Fund, 421 U.S. 491 (1975), the Court has reaffirmed its strong adherence to legislative privilege: "Without exception, our cases have read the Speech or Debate Clause broadly to effectuate its purposes". The Chief Justice's opinion explains that the purpose of the clause is "to insure that the legislative function the Court allocates from Congress may be performed independently", and the clause serves the additional function of reinforcing the "separation of powers" doctrine. The majority also observed that "the wisdom of Congressional approach is not open to judicial veto." The five-man majority is joined by three justices in concurrence, who make particular mention of the informing function by Congress as legitimate legislative activity. *Id.* at 515. Only Justice Douglas dissented. In our view the most recent pronouncement is the proper approach to Speech or Debate and a return to its traditional interpretation. The Court need only apply this interpretation to the facts at hand and recognize a protected right and interest of a Congressman in criticizing public spending through distribution of his speeches and by communicating with his constituents.

We do not intend to review here the history and precedents of Speech or Debate immunity. Those precedents have already been set forth to the Court in other cases and are contained to a large degree in this Court's decisions from *Kilbourn* v. *Thompson*, 103 U.S. 168 (1881), through *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1975). They are elaborately reviewed in the materials assembled

for our hearings on Constitutional immunity.[23] It is sufficient for our presentation to quote our report:[24]

> Having come, then, from *Kilbourn to Dombrowski*—the Court's determination of the scope of legislative immunity under the Speech or Debate Clause and the persons to whom that immunity applied was characterized by language such as immunity being applicable "to things generally done in a session of the House by one of its members in relation to the business before it" (*Kilbourn*) and that "legislators engaged 'in the sphere of legitimate legislative activity,'" (*Tenney*) "should be protected not only from the consequences of litigation's results but also from the burden of defending themselves" (*Dombrowski*) and be free in the discharge of the legislative duties of office from "intimidation by the executive and accountability before a possibly hostile judiciary." (*Johnson.*)

Those cases presented a formidable bar against questioning in any other place. The divided opinions and shifting majorities in *Brewster, Gravel* and *Doe* erode much of the certainty of that bar even though confidence has been partially restored by the near unanimity of the Court in *Eastland*. The instant case presents a new opportunity to re-examine the role of Congress in its informing, investigative, and oversight functions and to reaffirm that this Congressional business is immune from attack or questioning in any other place.

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[23] *Hearings*, *supra* n. 8.

[24] S. Rep. No. 93-896, 93rd Cong., 2d Sess. 14 (1974).

Two historical precedents of particular significance and application to the case here should be dispositive of the question whether to affirm protection for the conduct of Mr. Proxmire. We refer to the case of Sir William Williams,[25] whose conviction for *distributing* reports of Parliament directly led to the English Bill of Rights Speech or Debate Clause from which our own is borrowed. Mr. Proxmire's distribution of speeches from the floor relating directly to the business and concerns of that body—government spending—is closely analogous.

Secondly, we refer to *Cabell's* case,[26] the inquiry into the distribution of newsletters of a representative to his constituents critical of executive action. The petition of Jefferson and Madison rejecting this inquiry as an intrusion upon the legislative function was successful in halting the inquiry.

The precedent of that case, so early after the adoption of the Constitution, is of the greatest significance here—Congressmen must be protected in their communications with their constituents when they confer with them about the government's business and must not be questioned in any other place. The Senate and House have recognized this obligation by facilitating this communication and information. The Court should also recognize this informing function and accord to its exercise the highest measure of protection afforded with Speech or Debate immunity. A weakened legislative immunity undermines the separation of powers doctrine, impairs the openness of government which we have so diligently tried to achieve—not only for our own branch, but for the Executive—casts doubt upon the protection of our Constitutional mandate to keep our proceedings open, makes hollow the right of our citizens to petition their representatives with just grievances, and in short, challenges the very basic pillars of democratic government. It is because of these grave concerns that we urge upon the Court a renewed affirmance of Congressional immunity embracing the informing and investigative functions of Congress.[26]

[25] 13 How. St. Tr. 1370 (1684–1695).

[26] See Jefferson-Madison Petition in *8 Works of Thomas Jefferson* 322 (Ford ed. 1904).

The Senate urges that the Court in its review of this petition reaffirm the historical reach of the doctrine of Congressional immunity; recognize Speech or Debate immunity for newsletters, press releases, and public statements by Members of Congress on matters pending before or of interest to the Congress; and recognize Speech or Debate immunity for communications with the Executive Branch on matters pending before or of interest to the Congress.

[26] Of no less importance in the legislative process is the performance of investigative and oversight functions. Both of these functions relate to communication with constituents. All legislation starts with some information, some concern or knowledge by an individual Congressman. From his requests—most often to the Executive Branch—more information is developed to the point where formal committee action is taken through hearing, followed by drafting, mark-up, and enactment of legislation. Investigation and oversight are more fully treated in Senator Proxmire's brief and in the *amici* brief on behalf of the Leadership of the House,which we do not repeat but adopt by reference.

CONCLUSION

For the foregoing reasons, the Senate prays that the judgment of the court of appeals be affirmed.

Respectfully submitted,

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MARCH 29, 1979.

APPENDIX

S. RES. 113

In the Senate of the United States

March 22, (legislative day, February 22), 1979.

Whereas the Supreme Court of the United States on January 7, 1979, issued a writ of certiorari in the case of Hutchinson v. Proxmire, et al.; and

Whereas this civil action against the Senator from Wisconsin (Mr. Proxmire) seeks damages for actions that were performed within the scope of the Senator's duties and responsibilities as a Member of the Senate under the Constitution of the United States; and

Whereas the Senate, by Senate Resolution 463, Ninety-fourth Congress, has supported the defense of Senator Proxmire in defending the civil action brought against him for the purpose of protecting the interests of the Senate; and

Whereas in this case the Supreme Court will consider the scope and meaning of the protection provided to Members of the Congress by Article I, Section 6, of the United States Constitution, the Speech or Debate clause, including the application of this provision to Senators and their aides, and the types of activity protected; and

Whereas this case involves the informing function of the Congress and the right of Members of the Senate to inform their constituents, colleagues, and the public; and

Whereas this case involves the investigation and oversight functions of the Congress and the right of the Members of the Senate to obtain information in their contact with the executive branch of the Government; and

Whereas the District Court and the Circuit Court of Appeals have recognized the application of the Speech or Debate clause to the conduct complained of in this case; and

Whereas a decision in this case may impair the constitutional independence and prerogatives of every individual Senator, and of the Senate as a whole; and

Whereas the Senate of the United States has a responsibility to insure that its interests are properly and completely represented before the Supreme Court: Now, therefore, be it

Resolved, That there is established a committee of the Senate consisting of the President pro tempore of the Senate, the Majority Leader and Minority Leader of the Senate, and the chairman and ranking minority member of the Committee on Rules and Administration. Such committee is authorized and directed to appear and/or to file, on behalf of the Senate of the United States, a brief as amicus curiae in the case of Hutchinson v. Proxmire et al., now pending in the Supreme Court of the United States.

SEC. 2. The Secretary of the Senate shall transmit a copy of this resolution to the Supreme Court.

Attest:

Secretary.

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